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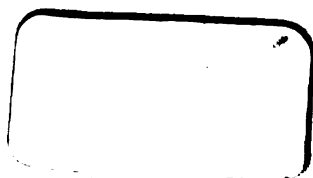
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

**WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.**

—
By JOHN L. GRIFFITHS,
OFFICIAL REPORTER.
—

VOL. 128,

**CONTAINING CASES DECIDED AT THE NOVEMBER TERM,
1890, NOT PUBLISHED IN VOLUMES 126 AND 127, AND
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TABLE OF THE CASES

REPORTED IN THIS VOLUME.

Aiken, Grigsby v.....	591	Chicago and Indiana Coal R. W. Co. v. Hunter.....	213
Anderson v. Anderson.....	254	Cincinnati Steam Heating Co., Board of Commissioners of Gib- son Co. v.....	240
Aspy, Steele v.....	367	Citizens' Ins. Co. v. Hoffman.....	370
Austin v. Davis.....	472	Citizens' Street R. R. Co., Western Paving and Supply Co. v.....	525
Barnes v. Sammons.....	596	Citizens' Street R. W. Co. v. Rob- bins.....	449
Barrett v. Sear.....	261	City of Frankfort v. State, ex rel. Ross.....	438
Bassett, Ellis v.....	118	City of Lawrenceburgh, Small v.....	231
Belt Railroad and Stockyard Co., Mann v.....	138	Cook v. McNaughton.....	410
Bence, Huffmond v.....	131	Cox, Shattuck v.....	293
Berry v. Louisville, Evansville and St. Louis R. R. Co.....	484	Craig, Montgomery v.....	48
Bingham v. Walk.....	164	Cravens, Orr v.....	359
Blue Ridge Marble Co. v. Duffy.....	79	Crowder v. Town of Sullivan.....	486
Board of Commissioners of Foun- tain Co. v. Board of Commis- sioners of Warren Co.....	295	Crum v. Meeks.....	360
Board of Commissioners of Gib- son Co. v. Cincinnati Steam Heating Co.....	240	Culbertson, Parker v.....	319
Board of Commissioners of Rush Co., Gilson v.....	65	Cummings v. Martin.....	20
Board of Commissioners of Tip- ton Co., Woods v.....	289	Custer, Michigan Mutual Life Ins. Co. v.....	25
Board of Commissioners of War- ren Co., Board of Commis- sioners of Fountain Co. v.....	295	Darnell, Sumner v.....	38
Bogard, State, ex rel. Reese, v.....	480	Davis, Austin v.....	472
Boicourt, Lane v.....	420	Davis v. Fasig.....	271
Bowen v. Stewart.....	507	Davis v. Ladoga Creamery Co., by Talbut, Receiver.....	222
Boyce, Neely v.....	1	Dick v. Mullins.....	365
Brazil Block Coal Co., Hyland v.....	335	Dickey, English v.....	174
Brighton v. White.....	320	Dickey v. Shirk.....	278
Brownlee, Cashman v.....	266	Duffy, Blue Ridge Marble Co. v.....	79
Brunker, Terre Haute and In- dianapolis R. R. Co. v.....	542	Eller v. Evans.....	156
Budd v. Reidelbach.....	145	Ellis v. Bassett.....	118
Burch, Nichols, Shepard & Co. v.....	324	English v. Dickey.....	174
Cadwallader v. Louisville, New Albany and Chicago R. W. Co.....	518	Evans, Eller v.....	156
Cashman v. Brownlee.....	266	Evansville and Richmond R. R. Co. v. Swift.....	34
Chaplin v. Sullivan.....	50	Falley v. Gribbling.....	110
		Fasig, Davis v.....	271
		Fenstamaker, Hewett v.....	315

TABLE OF CASES REPORTED.

First Nat'l Bank of Peru v. Parsons	147	Talbut, Receiver, Davis v.	222
Florer v. Sherwood	495	La Matt v. State, ex rel. Lucas ..	123
Fontanet Co-Operative Mining Ass'n, Shull v.	331	Lane v. Boicourt	420
Frankfort, City of, v. State, ex rel. Ross	438	Lawrenceburgh, City of, Small v.	231
Franklin, Mills v.	444	Leming v. Sale	317
Freedom, Town of, v. Norris	377	Louisville, Evansville and St. Louis R. R. Co., Berry v.	484
Galbraith, State, ex rel. Harrison, v.	501	Louisville, New Albany and Chicago R. W. Co., Cadwallader v.	518
Gammon Theological Seminary v. Robbins	85	Louisville, New Albany and Chicago R. W. Co. v. Hendricks ..	462
Geisendorff, McDonald v.	153	Louisville, New Albany and Chicago R. W. Co., Miller v.	97
Gilson v. Board of Commissioners of Rush Co.	65	Louisville, New Albany and Chicago R. W. Co. v. Wolfe ..	347
Goff v. McGee	394	Loy v. Loy	150
Gribbling, Falley v.	110	Luzader v. Richmond	344
Grigsby v. Aiken	591	Mann v. Belt Railroad and Stock Yard Co.	138
Griswold v. Ward	389	Mansfield v. Shipp	55
Hardy, Mills v.	311	Martin, Cummings v.	20
Hartmetz, Hermann v.	353	McClatchey, Ries v.	125
Harvey, Hoffman v.	600	McCollum v. Uhl	304
Hastings, Horton v.	103	McCumber, Montgomery v.	374
Hawkins v. Taylor	431	McDonald v. Geisendorff ..	153
Hedrick v. Hedrick	522	McGee, Goff v.	394
Hendricks, Louisville, New Albany and Chicago R. W. Co. v.	462	McHenry v. Knickerbacker ..	77
Hewett v. Fenstamaker	315	McNamee v. Rauck	59
Hoffman, Citizens' Ins. Co. v.	370	McNaughton, Cook v.	410
Hoffman v. Harvey	600	Meeks, Crum v.	360
Hoffman, Indiana Ins. Co. v.	250	Merrill v. Shirk	503
Hormann v. Hartmetz	353	Messick v. Midland R. W. Co.	81
Horton v. Hastings	103	Michigan, Cummings v.	20
Huffmond v. Bence	131	Michigan Mutual Life Ins. Co. v. Custer	25
Hughes v. Willson	491	Midland R. W. Co., Messick v.	81
Hunter, Chicago and Indiana Coal R. W. Co. v.	213	Miller v. Louisville, New Albany and Chicago R. W. Co.	97
Hyland v. Brazil Block Coal Co.	335	Mills v. Franklin	444
Indiana Ins. Co. v. Hoffman	250	Mills v. Hardy	311
Indiana Natural Gas and Oil Co., Jamieson v.	555	Montgomery v. Craig	48
Ingerman v. State, ex rel. Conroy ..	225	Montgomery v. McCumber ..	374
Jackson, Plank v.	424	Mullins, Dick v.	365
Jamieson v. Indiana Natural Gas and Oil Co.	555	Neely v. Boyce	1
Johnson v. Johnson	93	Newlon v. Tyner	466
Johnson, Spidell v.	235	Newman v. Kiser	258
Johnston v. State, ex rel. Sefton ..	16	Nichols, Shepard & Co. v. Burch ..	324
Joslyn v. State	160	Norris, Town of Freedom v.	377
Judson, Romaine v.	403	Ohio and Mississippi R. W. Co. v. Pearcy	197
Kiser, Newman v.	258	Orr v. Cravens	359
Knickerbacker, McHenry v.	77	Orr v. Owens	229
Ladoga Creamery Company, by		Osborne v. State, ex rel. Michaels ..	129
		Owens, Orr v.	229
		Parker v. Culbertson	319

TABLE OF CASES REPORTED.

v

Parsons, First Nat'l Bank of Peru v.	147	State, ex rel. Conroy, Ingerman v.	225
Parsons v. Pierson.	479	State, ex rel. Harrison, v. Galbraith.	501
Pearcy, Ohio and Mississippi R. W. Co. v.	197	State, ex rel. Hughes, Wills v.	359
Pierson, Parsons v.	479	State, ex rel. Lucas, La Matt v.	123
Plank v. Jackson.	424	State, ex rel. Michaels, Osborne v.	129
Purvis, Tarkington v.	182	State, ex rel. Powers, Robinson v.	397
Quick, Reynolds v.	316	State, ex rel. Reese, v. Bogard.	480
Rauck, McNamee v.	59	State, ex rel. Ross, City of Frankfort v.	438
Reese, Scruggs v.	399	State, ex rel. Sefton, Johnston v.	16
Reidelbach, Budd v.	145	Steele v. Aspy.	367
Reynolds v. Quick.	316	Stetler, Scott v.	385
Rhodes v. State.	189	Stewart, Bowen v.	507
Richmond, Luzader v.	344	Sullivan, Chaplin v.	50
Ries v. McClatchey.	125	Sullivan, Town of, Crowder v.	486
Ritter, Sedwick v.	209	Sumner v. Darnell.	38
Robbins, Citizens' Street R. W. Co. v.	449	Swift, Evansville and Richmond R. R. Co. v.	34
Robbins, Gammon Theological Seminary v.	85	Tarkington v. Purvis.	182
Robinson v. State, ex rel. Powers.	397	Taylor, Hawkins v.	431
Romaine v. Judson.	403	Terre Haute and Indianapolis R. R. Co. v. Brunker.	542
Sale, Leming v.	317	Terre Haute and Logansport R. R. Co. v. Soice.	105
Sammons, Barnes v.	596	Town of Freedom v. Norris.	377
Scott v. Stetler.	385	Town of Sullivan, Crowder v.	486
Scruggs v. Reese.	399	Tyner, Newlon v.	466
Sear, Barrett v.	261	Uhl, McCollum v.	304
Sedwick v. Ritter.	209	Vaughan v. State.	14
Shattuck v. Cox.	293	Walk, Bingham v.	164
Sherwood, Florer v.	495	Ward, Griswold v.	389
Shipp, Mansfield v.	55	Western Paving and Supply Co. v. Citizens' Street R. R. Co.	525
Shirk, Dickey v.	278	White, Brighton v.	320
Shirk, Merrill v.	503	Wills v. State, ex rel. Hughes.	359
Shull v. Fontanet Co-Operative Mining Ass'n.	331	Willson, Hughes v.	491
Small v. City of Lawrenceburgh.	231	Wolfe, Louisville, New Albany and Chicago R. W. Co. v.	347
Soice, Terre Haute and Logansport R. R. Co. v.	105	Woods v. Board of Commissioners of Tipton Co.	289
Spidell v. Johnson.	235		
State, Joslyn v.	160		
State, Rhodes v.	189		
State, Vaughan v.	14		

TABLE OF THE CASES

CITED IN THIS VOLUME

Abdil v. Abdil, 33 Ind. 460. 84, 386	Baldwin v. City of Buffalo, 29 Barb. 396. 383
Abila v. Burnett, 33 Cal. 658. 114	Baltimore, etc., R. R. Co. v. Johnson, 84 Ind. 420. 260
Acton v. Blundell, 12 M. & W. 324. 590	Baltimore, etc., R. R. Co. v. Walborn, 127 Ind. 142. 141
Adams v. Beem, 4 Blackf. 128. 259	Barber, etc., Co. v. Edgerton, 125 Ind. 455. 515
Adams v. County, etc., 11 Ill. 336. 46	Barrett v. Bamber, 9 Phila. 202. 493
Adams v. Kennedy, 90 Ind. 318. 85	Barrie v. Smith, 47 Mich. 130. 47
Adams v. Wilson, 60 Ind. 560. 257	Bass v. City of Fort Wayne, 121 Ind. 389. 388
Ahern v. Easterby, 42 Conn. 546. 152	Bass Foundry, etc., v. Board, etc., 115 Ind. 234. 244
Alabama, etc., R. R. Co. v. Hill, 90 Ala. 71. 554	Battle v. Davis, 66 N. C. 252. 224
Albrecht v. C. C. Foster Lumber Co., 126 Ind. 318. 323	Bayles v. Wallace, 56 Hun. 428. 249
Allen v. Davis, 99 Ind. 216. 22	Bayless v. Glenn, 72 Ind. 5. 294
Allen v. Davis, 101 Ind. 187. 22	Bearss v. Montgomery, 46 Ind. 541. 515
Allen v. South Boston R. R. Co., 15 Am. St. Rep. 185. 461	Beauchamp v. State, 6 Blackf. 299. 19
Ames v. Port Huron Log Driving, etc., Co., 11 Mich. 139. 590	Bedford, etc., R. R. Co. v. Rainbolt, 99 Ind. 551. 465
Anderson v. Buchanan, 8 Ind. 132. 120	Beer Co. v. Massachusetts, 97 U. S. 25. 566
Anderson v. Crist, 113 Ind. 65. 49	Begien v. Freeman, 75 Ind. 398. 515
Anderson v. Endicutt, 101 Ind. 539. 403	Behymer v. State, 95 Ind. 140. 195
Anderson v. Kern's Draining Co., 14 Ind. 199. 70	Bellefontaine R. W. Co. v. Hunter, 33 Ind. 335. 141, 521
Anderson v. Scholey, 114 Ind. 553. 465	Ben v. State, 22 Ala. 9. 161
Anderson v. Spence, 72 Ind. 315. 249	Benefiel v. Aughe, 93 Ind. 401. 358
Appeal of City of Erie, 91 Pa. St. 398. 488	Beste v. Burger, 110 N. Y. 644. 149
Armstrong v. Fearnaw, 67 Ind. 429. 64	Bills v. Belknap, 36 Iowa, 583. 590
Arnold v. Cord, 16 Ind. 177. 266	Binford v. Adams, 104 Ind. 41. 54
Arnold v. Stephenson, 79 Ind. 126. 479	Bingham v. Board, etc., 55 Ind. 113. 299
Atkinson v. Jackson, 8 Ind. 31. 479	Birmingham, etc., R. W. Co. v. Birmingham, etc., R. W. Co., 79 Ala. 465. 530
Attorney General v. Board, etc., 64 Mich. 607. 17	Black v. Thompson, 107 Ind. 162. 76
Aughie v. Landis, 95 Ind. 419. 249	Blair v. Hanna, 87 Ind. 298. 323
Babbitt v. Bowen, 32 Vt. 437. 515	Blair v. Smith, 114 Ind. 114. 330
Babcock v. Doe, 8 Ind. 110. 85	Board, etc., v. Arrghi, 51 Miss. 667. 228
Baily v. Schrader, 34 Ind. 260. 318	
Baker v. Leathers, 3 Ind. 558. 266	
Baker v. Neff, 73 Ind. 68. 489	
Bakewell v. Police Jury, 20 La. Ann. 334. 72	

TABLE OF CASES CITED.

vii

Board, etc., v. Fullen, 111 Ind. 410. 239	Buchanan v. Milligan, 108 Ind. 433. 384, 415, 417
Board, etc., v. Hall, 70 Ind. 469. 76, 307	Buchart v. Burger, 115 Ind. 123. 358
Board, etc., v. Leggett, 115 Ind. 544. 191	Buck v. Axt, 85 Ind. 512. 57
Board, etc., v. Markle, 46 Ind. 96. . 308	Buffalo, etc., R. R. Co. v. Board, etc., 48 N. Y. 93. 72
Board, etc., v. Miller, 87 Ind. 257. . 246	Bufkin v. Boyce, 104 Ind. 53. . . 370
Board, etc., v. Patterson, 56 Ill. 111. 47	Bull v. Southwick, 2 N. M. 321. . 178
Board, etc., v. People, ex rel., 24 Ill. App. 410. 227	Bunnell v. Peet, 123 Ind. 436. . 396
Board, etc., v. Senn, 117 Ind. 410. 234, 498	Burns v. Barenfield, 84 Ind. 43. . 421
Board, etc., v. Shipley, 77 Ind. 553. 246	Burns v. People, 1 Parker Crim. C. 182. 163
Board, etc., v. Thompson, 106 Ind. 534. 303	Burns v. Singer Mfg. Co., 87 Ind. 541. 373
Boaz v. McChesney, 53 Ind. 193. 364	Burwell v. Hobson, 12 Gratt. 322. 121
Bohler v. Tappan, 1 McCrary, 134. 149	Butler University v. Conard, 94 Ind. 353. 256
Boling v. Howell, 93 Ind. 329. 85, 188	Cain v. Hanna, 63 Ind. 408. 53
Bolton v. Miller, 6 Ind. 262. . . . 485	Calloway Co. v. Nolley, 31 Mo. 393. 383
Boor v. Lowrey, 103 Ind. 468. . . . 421	Camp v. Simson, 118 Ill. 224. . . 234
Booth v. Cottingham, 126 Ind. 431. 260	Canfield v. State, ex rel., 56 Ind. 168. 397
Bouvey v. McNeal, 126 Ind. 541. . 22	Cannon v. Boyd, 73 Pa. St. 179. . 122
Bowles v. State, 37 Ohio St. 35. . . 70	Carder v. Board, etc., 16 Ohio St. 353. 42
Bowman v. Chicago, etc., R. W. Co., 125 U. S. 465. 581	Carithers v. Stuart, 87 Ind. 424. . 54
Boyd v. Byrd, 8 Blackf. 113. . . . 485	Carmichael v. Adams, 91 Ind. 526. 323
Brackett v. Norton, 4 Conn. 517. . 260	Carother's Appeal, 118 Pa. St. 468. 586
Bralen v. Graves, 85 Ind. 92. . . . 54	Carr v. Hays, 110 Ind. 408. . . . 537
Bradley v. State, 31 Ind. 492. . . . 194	Carr v. State, 23 Neb. 749. . . . 196
Bradshaw v. Warner, 54 Ind. 58. 369	Carter v. Ford Plate Glass Co., 85 Ind. 180. 466
Brenner v. Quick, 88 Ind. 546. . . 212	Carver v. Lewis, 104 Ind. 438. . . 104
Brickell v. New York, etc., R. R. Co., 120 N. Y. 290. 100	Carver v. Lewis, 105 Ind. 44. . . 104
Bright v. McCullough, 27 Ind. 223. 69	Case v. Wrestler, 4 Ohio St. 561. . 227
Brimmer v. Rebman, 138 U. S. 78. 582, 590	Cassady v. Magher, 85 Ind. 228. . 292
Briscoe v. Johnson, 73 Ind. 573. . 104	Catalani v. Catalani, 124 Ind. 54. . 49
Brock v. Harris, 11 How. 204. . . . 259	Cate v. Cranor, 30 Ind. 292. . . . 446
Brosemer v. Kelsey, 106 Ind. 504. 307	Catlett v. Trustees, etc., 62 Ind. 365. 416
Brower v. O'Brien, 2 Ind. 423. . . . 17	Challiss v. Parker, 11 Kan. 394. . 72
Brown v. Caldwell, 23 W. Va. 187. . 47	Chamberlain v. Reid, 49 Ind. 332. 465
Brown v. Cody, 115 Ind. 484. . . . 393	Chambers v. Butcher, 82 Ind. 508. 419
Brown v. Forst, 95 Ind. 248. . . . 364	Chicago v. Sheldon, 9 Wallace, 50. 529
Brown v. Herron, 59 Ind. 61. . . . 316	Chicago, etc., R. R. Co. v. Boggs, 101 Ind. 522. 551
Brown v. Houston, 114 U. S. 622. 581	Chicago, etc., R. R. Co. v. Hedges, 105 Ind. 398. 521
Brown v. Maher, 68 Ind. 14. . . . 230	Chicago, etc., R. R. Co. v. Hol- dridge, 118 Ind. 281. 352
Brown v. Owen, 94 Ind. 31. . . . 173, 470	Chicago, etc., R. W. Co. v. Hedges, 118 Ind. 5. 100, 141
Brown v. Piper, 91 U. S. 37. . . . 574	Chicago, etc., R. W. Co. v. Jones, 103 Ind. 386. 215
Brown v. Rawlings, 72 Ind. 505. 329	Chy Lung v. Freeman, 92 U. S. 275. 581
Brown v. Russell & Co., 105 Ind. 46. 323	Cincinnati, etc., R. R. Co. v. But- ler, 103 Ind. 31. 100, 141, 521
Brown v. State, 105 Ind. 385. . . . 195	Cincinnati, etc., R. R. Co. v. Mc- Mullen, 117 Ind. 439. 203
Brown v. Will, 103 Ind. 71. 22	
Browning v. Board, etc., 44 Ind. 11. 301	
Brownlee v. Kenneipp, 41 Ind. 216. 465	
Bryan v. Uland, 101 Ind. 477. . . 377	
Buchanan v. Berkshire, etc., Ins. Co., 96 Ind. 510. 358, 370	
Buchanan v. Logansport, etc., R. W. Co., 71 Ind. 265. 83	

Cincinnati, etc., R. W. Co. v. Geisel, 119 Ind. 77.....	270	Coffin v. City of Portland, 16 Ore. 77.....	47
Cincinnati, etc., R. W. Co. v. Howard, 124 Ind. 280.....	101	Coldron v. Rhode, 7 Ind. 151.....	515
Citizens Bank v. Bolen, 121 Ind. 301.....	384	Cole v. Kegler, 64 Iowa, 59.....	590
Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332.....	489, 564, 586	Coleman v. Lyman, 42 Ind. 289.....	389
Citizens' R. W. Co. v. Jones, 34 Fed. Rep. 579.....	530	Coleman v. Tennessee, 97 U. S. 509.....	580
City of Aurora v. Fox, 78 Ind. 1.....	488	Collett v. Board, etc., 119 Ind. 27.....	383
City of Crawfordsville v. Boots, 76 Ind. 32.....	52	Collins v. Prentice, 15 Conn. 39.....	121
City of Crawfordsville v. Johnson, 51 Ind. 397.....	64	Collins v. Prentice, 15 Conn. 423.....	121
City of East St. Louis v. East St. Louis, etc., Co., 98 Ill. 415.....	488	Columbia Conduit Co. v. Commonwealth, 90 Pa. St. 307.....	586
City of Elkhart v. Wickwire, 87 Ind. 77.....	354	Columbus, etc., R. W. Co. v. Braden, 110 Ind. 558.....	49
City of Greencastle v. Hazelett, 23 Ind. 186.....	590	Columbus, etc., R. W. Co. v. Powell, 40 Ind. 37.....	269
City of Greenfield v. State, ex rel., 113 Ind. 597.....	358	Commissioners, etc., v. Taylor, 2 Bay, 282.....	383
City of Hammond v. New York, etc., R. W. Co., 126 Ind. 597.....	324	Commonwealth v. Andrews, 2 Mass. 409.....	162
City of Indianapolis v. Patterson, 112 Ind. 344.....	213	Commonwealth v. Peckham, 2 Gray, 514.....	564
City of Lafayette v. Fowler, 34 Ind. 140.....	538	Commonwealth, ex rel., v. Slifer, 25 Pa. St. 23.....	130
City of Logansport v. Case, 124 Ind. 254.....	342	Commonwealth Ins. Co. v. Monninger, 18 Ind. 352.....	372
City of Michigan City v. Boeckling, 122 Ind. 39.....	99	Comparet v. Hedges, 6 Blackf. 416.....	185
City of New Albany v. McCulloch, 127 Ind. 500.....	488	Conant v. Nat'l State Bank, 121 Ind. 323.....	537
City of New Haven v. Fair Haven, etc., R. R. Co., 38 Conn. 422.....	538	Conduitt v. Ross, 102 Ind. 166.....	388
City of New Orleans v. City of Baltimore, 15 La. 625.....	113	Cones v. Cincinnati, etc., R. W. Co., 114 Ind. 328.....	100
City of Pella v. Scholte, 24 Iowa, 283.....	382	Conner v. Citizens, etc., R. W. Co., 105 Ind. 62.....	143, 415, 417
City of Portland v. Terwilliger, 16 Ore. 465.....	47	Continental, etc., R. R. Co. v. Stead, 95 U. S. 161.....	550
City of Valparaiso v. Gardner, 97 Ind. 1.....	488	Conway v. State, 118 Ind. 482.....	192
Clark v. Fitch, 2 Wendell, 459.....	485	Conyers v. Mericles, 75 Ind. 443.....	64
Clark v. State, ex rel., 125 Ind. 1.....	366	Cook v. City of Burlington, 30 Iowa, 94.....	381
Clark v. Wright, 67 Ind. 224.....	260	Cook v. Cook, 92 Ind. 398.....	113
Clarke v. Henshaw, 30 Ind. 144.....	364	Cook v. Leggett, 88 Ind. 211.....	45
Clem v. State, 42 Ind. 420.....	161	Cooley v. Board, etc., 12 How. 299.....	579
Cleveland, etc., R. R. Co. v. Crawford, 24 Ohio St. 631.....	143	Cooley v. Port Wardens of Philadelphia, 12 How. 299.....	573
Cleveland, etc., R. R. Co. v. Newell, 104 Ind. 264.....	465	Coon v. Vaughn, 64 Ind. 89.....	421
Cleveland, etc., R. R. Co. v. Wyant, 100 Ind. 160.....	205	Coope v. Bowles, 28 How. Pr. 10.....	224
Clifford v. Lühring, 69 Ill. 401.....	249	Cooter v. Baston, 89 Ind. 185.....	256
Coast-Line Railroad Co. v. Mayor, etc., 30 Fed. Rep. 646.....	529	Copeland v. Copeland, 89 Ind. 29.....	135
		Copenhagen v. State, 14 Ga. 8.....	163
		County Judge v. Shelby R. R. Co., 5 Bush, 225.....	72
		County of Mobile v. Kimball, 102 U. S. 691.....	573, 590
		Cowan v. State, 22 Neb. 519.....	196
		Cox v. Arnsmann, 76 Ind. 210.....	266
		Cox v. Dill, 85 Ind. 334.....	472
		Craig v. Frazier, 127 Ind. 286.....	258
		Crandall v. State, 6 Wall. 35.....	579

TABLE OF CASES CITED.

ix

Crane v. Inhabitants, etc., 135 Mass. 147.....	47	Dubois v. McLean, 4 McLean, 486. 114	
Crawford v. Edison, 45 Ohio St., 239.....	249	Dunbar v. Rawles, 28 Ind. 225. 369	
Crim v. Fleming, 101 Ind. 154. 328		Duncan v. Gainey, 108 Ind. 579. 54	
Crooks v. Kennett, 111 Ind. 347. 22		Dunkle v. Elston, 71 Ind. 585. 57	
Crookshank v. Kellogg, 8 Blackf. 256.....	85	Dunning v. Driver, 25 Ind. 269. 114	
Crosby v. Jerolman, 37 Ind. 264. 249		Dunning v. Seward, 90 Ind. 63. 54	
Crowley v. Christensen, 137 U.S. 86.....	565	Dunnington v. Elston, 101 Ind. 373.....	393
Cummins v. Walden, 4 Blackf. 307.....	465	Durham v. State, ex rel., 117 Ind. 477.....	18
Cupp v. Campbell, 103 Ind. 213. 22		Eastman v. State, 109 Ind. 278. 564	
Curry v. Stewart, 8 Bush, 560. 130		Egberts v. Woods, 3 Paige, 516. 149	
Curtis v. McIlhenny, 5 Jones Eq. 290.....	225	Egerton v. Egerton, 17 N. J. Eq. 419.....	92
Cushman v. Addison, 52 N. Y. 628.....	149	Elder v. State, 96 Ind. 162.....	69
		Electric, etc., Co. v. City, etc., of San Francisco, 9 R. W. Corp. Jour. 494.....	564
Daniel Ball, The, 10 Wall, 557. 586		Elkhart Car Works Co. v. Ellis, 113 Ind. 215.....	224
Darby v. Carson, 9 Ohio, 149. 212		Elliott v. Salle, 14 Ohio St. 10. 121	
Daugherty v. Rogers, 119 Ind. 254. 446		Ellison v. Jackson, etc., Co., 12 Cal. 542.....	249
Davenport v. McChesney, 86 N. Y. 242.....	327	Ellison v. Wisehart, 29 Ind. 32. 250	
Davidson v. Nicholson, 59 Ind. 411.....	122	Ely v. Board, etc., 112 Ind. 361. 76	
Davidson v. State, 99 Ind. 366. 163		Emerson v. Senter, 118 U. S. 3. 149	
Davis v. American Society, etc., 75 N. Y. 362.....	276	Emerson v. Slater, 22 How. 28. 247	
Davis v. Lake Shore, etc., R. W. Co., 114 Ind. 364.....	307	Engler v. Acker, 106 Ind. 223. 22	
Davis v. Lennen, 125 Ind. 185. 436		English v. Delaware, etc., Canal Co., 66 N. Y. 454.....	352
Davis v. Snead, 33 Gratt. 705. 224		Episcopal, etc., v. Appleton, 117 Mass. 326.....	43
Day v. Woodworth, 13 How. 362. 566		Epperson v. Hostetter, 95 Ind. 583.....	84, 386
Dean v. Dean, 3 Mass. 258. 114		Epps v. State, 102 Ind. 539. 466	
Dean v. Pennsylvania R. R. Co., 129 Pa. St. 514.....	101	Erwin v. Garner, 108 Ind. 488. 377	
Decker v. Sargeant, 125 Ind. 404. 277		Evans v. Adams Ex. Co., 122 Ind. 362.....	141
De Hart v. Haun, 126 Ind. 378. 421		Evans v. State, ex rel., 58 Ind. 587.....	398
Dent v. West Virginia, 129 U.S. 114.....	564	Evansville, etc., R. R. Co. v. City of Evansville, 15 Ind. 395. 308	
De Priest v. State, 68 Ind. 569. 466		Evansville, etc., R. R. Co. v. Crist, 116 Ind. 446.....	463
Devol v. Dye, 123 Ind. 321. 93		Evansville, etc., R. R. Co. v. Hays, 118 Ind. 214.....	234
Devor v. Rerick, 87 Ind. 337. 116		Evansville, etc., R. R. Co. v. Nye, 113 Ind. 223.....	33
Dewey v. State, ex rel., 91 Ind. 173. 76		Eve v. Louis, 91 Ind. 457. 386	
De Witt v. Smith, 63 Mo. 263. 63		Everett v. City of Council Bluffs, 46 Iowa, 66.....	590
Directors, etc., v. Jackson, 3 App. Cases H. L. 193.....	141	Everett v. City of Marquette, 53 Mich. 450.....	590
District of Columbia v. Washington, etc., R. R. Co., 4 Am. & Eng. R. R. Cases, 161.....	529	Fahnestock v. State, 102 Ind. 157. 160	
Diven v. Johnson, 117 Ind. 512. 537		Farley v. State, 127 Ind. 419. 195	
Dixon v. Duke, 85 Ind. 434. 417		Farman v. Chamberlain, 74 Ind. 82.....	83
Dodge v. Kinzy, 101 Ind. 102. 22			
Doherty v. Bell, 55 Ind. 205. 185			
Domestic Sewing Mach. Co. v. Arthurhult, 63 Ind. 322. 369			
Dow v. Norris, 4 N. H. 16. 569			
Doyal v. Landes, 119 Ind. 479. 366			

TABLE OF CASES CITED.

Farmers' Loan and Trust Co. v. Canada, etc., R. W. Co., 127 Ind. 250.....	335	Goldsby v. Robertson, 1 Blackf. 247.....	417
Farrar v. City of St. Louis, 80 Mo. 379.....	529	Goodall v. Godfrey, 53 Vt. 219.....	121
Farrar v. Dean, 24 Mo. 16.....	114	Goodall v. Mopley, 45 Ind. 355.....	53
Faught v. Faught, 98 Ind. 470.....	239	Goodrich v. Winchester, etc., T. P. Co., 26 Ind. 119.....	70
Faurote v. Carr, 108 Ind. 123.....	524	Gordon v. Gordon, 96 Ind. 134.....	246
Ferebee v. N. C. Mut., etc., Ins. Co., 68 N. C. 11.....	32	Gorton v. Erie R. W. Co., 45 N. Y. 660.....	143
Ferguson v. Barnes, 58 Ind. 161.....	515	Gosman v. State, ex rel., 106 Ind. 203.....	130, 481
Fertilizing Co. v. Hyde Park, 97 U. S. 659.....	566	Grant v. City of Davenport, 36 Iowa, 396.....	488
Field v. Holzman, 93 Ind. 205.....	323, 598	Gravier v. City of New Orleans, 1 Condensed Rep. 551.....	381
Filch v. Witbeck, 2 Bart. Ch. 161.....	114	Gray v. Stiver, 24 Ind. 174.....	231
First M. E. Church v. Old Columbia, etc., Co., 103 Pa. St. 608.....	47	Gray v. Turley, 110 Ind. 254.....	265
Fiscus v. Turner, 125 Ind. 46.....	366	Green v. Cresswell, 10 A. & E. 453.....	249
Fite v. Doe, 1 Blackf. 127.....	270	Green v. Elliott, 86 Ind. 53.....	147
Fitzgerald v. Glancy, 49 Ill. 465.....	114	Green v. Langdon, 28 Mich. 222.....	93
Fitzgerald v. Morrissey, 14 Neb. 198.....	249	Green v. Winter, 1 John. Ch. 60.....	224
Fitzpatrick v. Papa, 89 Ind. 17.....	173	Greenough v. Eicholtz, 1 Mon. 433.....	249
Foltz v. Peters, 16 Ind. 244.....	364	Greenvault v. Davis, 4 Hill, 643.....	388
Foltz v. Wert, 103 Ind. 404.....	64	Greenwood v. Freight Co., 105 U. S. 13.....	529
Fox v. Hart, 11 Ohio, 414.....	383	Grice's Estate, 11 Phila. 107.....	114
Franklin L. Ins. Co. v. Dehority, 89 Ind. 347.....	83	Griffin v. Long Island R. R. Co., 102 N. Y. 449.....	225
Frash v. Polk, 67 Ind. 55.....	249	Griffith v. Frederick County Bank, 6 G. & J. 424.....	114
Freeland v. Charnley, 80 Ind. 132.....	346	Groves v. Marks, 32 Ind. 319.....	380
Frese v. State, 23 Fla. 267.....	564	Gwaltney v. Gwaltney, 119 Ind. 144.....	377
Fresno Canal Co. v. Rowell, 80 Cal. 114.....	388	Hackleman v. Board, etc., 94 Ind. 36.....	246
Fretwell v. McLemore, 52 Ala. 124.....	515	Hackleman v. Miller, 4 Blackf. 322.....	249
Gage v. School District, 64 N. H. 232.....	47	Hadley v. Milligan, 100 Ind. 49.....	148
Galveston, etc., Co. v. Hourein, 9 S. W. R. 661.....	249	Hagadorn v. Stronach, etc., Co., 81 Mich. 56.....	249
Gano v. Aldridge, 27 Ind. 294.....	595	Hagerty v. Arnold, 13 Kansas, 367.....	17
Gardner v. State, ex rel., 94 Ind. 489.....	174	Haines v. Bottorff, 17 Ind. 348.....	57
Garfield v. State, 74 Ind. 60.....	194	Haldeman v. Bruckart, 45 Pa. St. 514.....	590
Garth v. Caldwell, 72 Mo. 622.....	574	Hamilton v. Barricklow, 96 Ind. 398.....	135
Garver v. Kent, 70 Ind. 428.....	223	Hamm v. Romine, 98 Ind. 77.....	174
Gatling v. Newell, 9 Ind. 572.....	185	Hammock v. Barnes, 4 Bush, 390.....	19
Gavin v. Buckles, 41 Ind. 528.....	389	Hannon v. Hilliard, 101 Ind. 310.....	57
Gentry v. Purcell, 84 Ind. 83.....	127	Hannibal, etc., R. R. Co. v. Hussen, 95 U. S. 465.....	578, 590
Gibbons v. Ogden, 9 Wheat. 1.....	578	Hardy v. McKinney, 107 Ind. 364.....	313
Gibson v. McCormick, 10 Gill & Johnson, 65.....	54	Hargroves v. Thompson, 31 Miss. 211.....	515
Gilman v. Philadelphia, 3 Wall. 713.....	578	Harmon v. James, 7 Ind. 263.....	245
Gladwell v. Steggall, 5 Bing. 733.....	421	Harrell v. Kent, 71 Ind. 602.....	224
Glenn v. Busey, 3 Cent. Rep. 283.....	224	Harris v. Shaw, 13 Ill. 456.....	46
Glenn v. Mayor, 5 Gill & J. 424.....	590		
Goble v. Dillon, 86 Ind. 327.....	421		

TABLE OF CASES CITED.

xi

Harvey v. Dewoody, 18 Ark. 252. 590	Hollingsworth v. Swedenborg, 49 Ind. 378. 152
Hathaway v. Toledo, etc., R. W. Co., 46 Ind. 25. 99	Holloway v. State, 53 Ind. 554. 466
Havens v. Erie R. W. Co., 41 N. Y. 296. 143	Holmes v. Farris, 63 Me. 318. 128
Haynes v. Thomas, 7 Ind. 38. 85	Holmes v. Taylor, 48 Ind. 169. 229
Hays v. Montgomery, 118 Ind. 91. 329	Holt v. State, 38 Ga. 187. 163
Hays v. Peck, 107 Ind. 389. 330	Home Ins. Co. v. Gilman, 112 Ind. 7. 29
Hays v. State, 77 Ind. 450. 15	Homer v. Guardian, etc., Ins. Co. 67 N. Y. 478. 30
Hays v. Vickery, 41 Ind. 583. 515	Hooker v. Axford, 33 Mich. 453. 493
Hayward v. Davidson, 41 Ind. 212. 42	Hoopingarner v. Levy, 77 Ind. 455. 421
Hazlett v. Sinclair, 76 Ind. 488. 388	Hope v. Troy, etc., R. R. Co., 40 Hun, 438. 423
Hazzard v. Vickery, 78 Ind. 64. 472	Hosford v. Johnson, 74 Ind. 479. 80, 365
Heanley v. State, 74 Ind. 99. 69	Hull v. Louth, 109 Ind. 315. 265, 358
Heaston v. Board, etc., 20 Ind. 398. 45	Hull v. State, ex rel., 93 Ind. 128. 192
Heberd v. Wines, 105 Ind. 237. 57	Humphries v. Davis, 100 Ind. 274. 341
Heckox v. Fay, 36 Barb. 9. 128	Humphries v. Davis, 100 Ind. 369. 299
Heddrich v. State, 101 Ind. 564. 19, 561	Hunt v. Beeson, 18 Ind. 380. 42
Hedley v. Board, etc., 4 Blackf. 116. 130	Hunt v. Campbell, 83 Ind. 48. 380
Heffren v. Jaynes, 39 Ind. 463. 493	Hunt v. Lake Shore, etc., R. W. Co., 112 Ind. 69. 298
Hellenkamp v. City of Lafayette, 30 Ind. 192. 538	Hunter v. Pfeiffer, 108 Ind. 197. 354
Henderson v. Clarke, 27 Miss. 436. 515	Husband v. Husband, 67 Ind. 583. 524
Henderson v. Dickey, 76 Ind. 264. 414	Ikerd v. Beavers, 106 Ind. 483. 135
Henderson v. Hunter, 59 Pa. St. 335. 45	Illinois, etc., Coal Co. v. Stookey, 122 Ill. 358. 234
Henderson v. Mayor, 92 U. S. 259. 578	Illinois Mut. Ins. Co. v. Hoffman, 132 Ill. 522. 253
Henderson v. Whiting, 56 Ind. 131. 364	Illinois State Hospital, etc., v. Higgins, 15 Ill. 185. 227
Hennessey v. City of St. Paul, 37 Fed. Rep. 565. 590	Indiana Central R. W. Co. v. State, etc., 3 Ind. 421. 277
Herron v. Vance, 17 Ind. 595. 224	Indiana, etc., R. W. Co. v. Allen, 100 Ind. 409. 36
Hess v. Lowrey, 122 Ind. 225. 421, 554	Indiana, etc., R. W. Co. v. Greene, 106 Ind. 279. 100, 141, 520
Hessian v. State, 116 Ind. 58. 358	Indiana, etc., R. W. Co. v. Hammock, 113 Ind. 1. 141, 520
Hessong v. Pressley, 86 Ind. 555. 414	Indiana, etc., R. W. Co. v. McBroom, 103 Ind. 310. 256
Heyl v. State, 109 Ind. 589. 193	Indiana Insurance Co. v. Hoffman, 128 Ind. 250. 372
Hibbard v. Kent, 15 N. H. 516. 515	Indianapolis, etc., R. R. Co. v. (Citizens', etc., R. R. Co., 127 Ind. 369. 489
High v. Board, etc., 92 Ind. 580. 246	Indianapolis, etc., R. R. Co. v. Jones, 29 Ind. 465. 269
Higham v. Harris, 108 Ind. 246. 185, 246	Indianapolis, etc., R. R. Co. v. McLin, 82 Ind. 435. 550
Hill v. Probst, etc., 120 Ind. 528. 76	Indianapolis, etc., R. R. Co. v. Pugh, 85 Ind. 279. 35
Hillebrant v. Brewer, 6 Tex. 45. 90	Indianapolis, etc., R. W. Co. v. Hood, 66 Ind. 580. 45
Hilton v. Mason, 92 Ind. 157. 76	Inhabitants of Brighton v. Wilkinson, 2 Allen, 27. 72
Hoag v. New York Central R. Co., 111 N. Y. 199. 100	
Hobbs v. Board, etc., 116 Ind. 376. 76	
Hobson v. Ewan, 62 Ill. 146. 457	
Hodson v. Davis, 43 Ind. 258. 477	
Hodson v. Warner, 60 Ind. 214. 369	
Hoffman v. Manufacturers' Mut., etc., Ins. Co. 38 Fed. R. 487. 253	
Hoffman v. Minneapolis, Mut., etc., Ins. Co., 42 Minn. 291. 253	
Hogan v. Robinson, 94 Ind. 138. 116	
Hoke v. Applegate, 92 Ind. 570. 52	
Holliday v. Thomas, 90 Ind. 398. 260	

Inhabitants of Norwich v. County Commissioners, 13 Pick. 60. 72	Key v. Ostrander, 29 Ind. 1. 595
Irwin v. Williar, 110 U. S. 499. 427	Keyes v. State, 122 Ind. 527. 102
Isbell v. Stewart, 125 Ind. 112. 159, 436	Kidd v. Pearson, 128 U. S. 1. 586
Jackson v. City Nat'l Bank, 125 Ind. 347. 425	Kilgour v. Ashcom, 5 Harr. & J. 82. 121
Jackson v. Smith, 120 Ind. 520. 308	Kimble v. Seal, 92 Ind. 276. 323
Jackson v. State, 104 Ind. 516. 76	Kimmish v. Ball, 129 U.S. 217. 582
Jackson School Tp. v. Farlow, 75 Ind. 118. 228	Kinsman v. State, 77 Ind. 132. 173
Jacobs, Matter of Application of, 98 N. Y. 98. 588	Kirkpatrick v. Taylor, 118 Ind. 329. 396
Jarrell v. State, 58 Ind. 293. 194	Kisler v. Cameron, 39 Ind. 488. 17
Jarvis v. Banta, 83 Ind. 528. 414	Kitts v. Willson, 89 Ind. 95. 267
Jeffersonville R. R. Co. v. Rogers, 38 Ind. 116. 352	Knight v. Heaton, 22 Vt. 480. 383
Jeffersonville, etc., R. R. Co. v. Barbour, 89 Ind. 375. 42	Knight v. State, 70 Ind. 375. 194
Jeffersonville, etc., R. R. Co. v. Hendricks, 41 Ind. 48. 269	Knight v. State, 84 Ind. 73. 15
Jeffries v. Rowe, 63 Ind. 592. 482	Knopf v. State, 84 Ind. 316. 160
Jenkins v. Compton, 123 Ind. 117. 12	Knox v. Lee, 12 Wall. 457. 579
Jenners v. Doe, 9 Ind. 461. 229	Koons v. Mellett, 121 Ind. 585. 12
Joab v. Sheets, 99 Ind. 328. 318	Krant v. State, 47 Ind. 519. 130
John v. Cincinnati, etc., R. R. Co., 35 Ind. 539. 70	Krutz v. Stewart, 54 Ind. 178. 249
John Hancock M. L. Ins. Co. v. Patterson, 103 Ind. 582. 121	Kuntz v. Sumption, 117 Ind. 1. 340
Johns v. Johns, 67 Ind. 440. 478	Kutzmeyer v. Ennis, 27 N. J. L. 371. 248
Johnson v. Tutewiler, 35 Ind. 353. 477	Lafayette, etc., R. R. Co. v. Geiger, 34 Ind. 185. 69
Johnston v. Griest, 85 Ind. 503. 245	Lafollett v. Kile, 51 Ind. 446. 479
Johnston v. State, ex rel., 128 Ind. 16. 359	Lake Erie, etc., R. W. Co. v. Acres, 108 Ind. 548. 352
Jolley v. Walker, 26 Ala. 690. 249	Lane v. Miller, 27 Ind. 534. 83
Jonas v. Jonas, 73 Ind. 601. 524	Langford v. Freeman, 60 Ind. 46. 249
Jones v. State, 118 Ind. 39. 470	Lanigan v. New York, etc., Co., 71 N. Y. 29. 564
Jones v. United States, 137 U. S. 202. 574	Larabee v. Carleton, 53 Me. 211. 43
Judah v. Trustees, etc., 23 Ind. 272. 513	Lashley v. Cassell, 23 Ind. 600. 494
Judah v. Zimmerman, 22 Ind. 388. 78	Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42. 269
Kealing v. Vansickle, 74 Ind. 529. 414	Law v. Henry, 39 Ind. 414. 479
Keeler v. Robertson, 27 Mich. 116. 19	Lawe v. Hyde, 39 Wis. 345. 47
Keeling v. State, 107 Ind. 563. 15	Lawrenceburgh, etc., R. R. Co. v. Montgomery, 7 Ind. 474. 85
Keen v. Breckenridge, 96 Ind. 69. 224	Ledford v. Ledford, 95 Ind. 283. 292
Kehr v. Hall, 117 Ind. 405. 385	Lee v. Fox, 113 Ind. 98. 327
Keiper v. Klein, 51 Ind. 316. 122	Lee County v. State, ex rel., 36 Ark. 276. 228
Keller v. McMahan, 77 Ind. 62. 128	Legal Tender Cases, 12 Wall. 457. 562
Kellogg v. Wood, 4 Paige Ch. 578. 388	Leisy v. Hardin, 135 U.S. 100. 573, 590
Kennedy v. State, 107 Ind. 144. 195	Levengood v. Hoople, 124 Ind. 27. 12
Kenney v. Phillipy, 91 Ind. 511. 330	Levering v. Shockey, 100 Ind. 558. 330
Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96. 31	Lewis v. Commissioners, etc., 16 Kan. 102. 17
Kern v. Bridwell, 119 Ind. 226. 554	License Cases, 5 How. 504. 561
Kernodle v. Caldwell, 46 Ind. 153. 386	Lindley v. Cross, 31 Ind. 106. 62
Ketcham v. Brazil, etc., Co., 88 Ind. 515. 137	Lindsay v. Glass, 119 Ind. 301. 135
	Lipes v. Hand, 104 Ind. 503. 147, 402
	Litchfield v. McComber, 42 Barb. 288. 72
	Lochenour v. Lochenour, 61 Ind. 595. 49
	Lockwood v. Rose, 125 Ind. 588. 465

TABLE OF CASES CITED.

xiii

Loeschigk v. Hatfield, 51 N. Y. 660.....	149	Martindale v. Palmer, 52 Ind. 411. 538	
Loesnitz v. Seelinger, 127 Ind. 422. 76		Mason v. Palmerton, 2 Ind. 117. 256	
Logan v. Stogsdale, 123 Ind. 372. 120		Massey v. Jerauld, 101 Ind. 270. 363	
Lohman v. State, 81 Ind. 15. 564		Mayhew v. Burns, 103 Ind. 328. 485	
Long v. Brown, 66 Ind. 160. 477		Mayne v. Board, etc., 123 Ind. 132. 340	
Long v. Crosson, 119 Ind. 3. 22		Mayor, etc., v. Ohio, etc., R.R. Co., 26 Pa. St. 355. 530	
Long v. State, 95 Ind. 481. 466		Mayor, etc., v. Radecke, 49 Md. 217. 276	
Long v. Straus, 107 Ind. 94. 245		Mayor, etc., v. United States, 10 Peters, 660. 381	
Long v. Williams, 74 Ind. 115. 354		McCarty v. Waterman, 96 Ind. 594. 470	
Loring v. Salisbury Mills, 125 Mass. 138. 458		McCasland v. Aetna Life Ins. Co., 108 Ind. 130. 64	
Louisville, etc., R. R. Co. v. Schmidt, 81 Ind. 264. 551		McComas v. Haas, 93 Ind. 276. 84, 386	
Louisville, etc., R. W. Co. v. Balch, 105 Ind. 93. 415, 417		McCormick v. Malin, 5 Blackf. 509. 493	
Louisville, etc., R. W. Co. v. Buck, 116 Ind. 566. 207		McCormick v. Webster, 89 Ind. 105. 515	
Louisville, etc., R. W. Co. v. Falvey, 104 Ind. 409. 57		McCoy v. State, ex rel., 121 Ind. 160. 358	
Louisville, etc., R. W. Co. v. Flannagan, 113 Ind. 488. 417		McCracken v. Cabel, 120 Ind. 266. 260	
Louisville, etc., R. W. Co. v. Goodykoontz, 119 Ind. 111. 485		McCurdy v. Bowes, 88 Ind. 583. 246	
Louisville, etc., R. W. Co. v. Hart, 119 Ind. 273. 417		McDowell v. Milroy, 69 Ill. 498. 494	
Louisville, etc., R. W. Co. v. Jones, 108 Ind. 551. 463		McLaughlin v. Citizens, etc., Ass'n, 62 Ind. 264. 69	
Louisville, etc., R. W. Co. v. Pedigo, 108 Ind. 481. 465		McLead v. Aetna L. Ins. Co., 107 Ind. 394. 83	
Louisville, etc., R. W. Co. v. Snyder, 117 Ind. 435. 465		McMullen v. State, 105 Ind. 334. 76	
Louisville, etc., R. W. Co. v. Thompson, 107 Ind. 442. 323		McNiel, Ex parte, 13 Wall. 236. 580	
Lowe v. Ryan, 94 Ind. 450. 147		McTaggart v. Rose, 14 Ind. 230. 317	
Lowman v. Sheets, 124 Ind. 416. 248		Mead v. Ballard, 7 Wall. 290. 47	
Lowrey v. Byers, 80 Ind. 443. 294		Meehan v. Wiles, 93 Ind. 52. 314	
Loy v. Loy, '90 Ind. 404. 358		Memphis, etc., Co. v. McCool, 83 Ind. 392. 465	
Lucas v. Labertue, 88 Ind. 277. 116		Mercer v. Mercer, 114 Ind. 558. 524	
Ludlow v. Walker, 67 Ind. 353. 358		Merritt v. Merritt, 16 Wend. 405. 224	
Machinists' Nat'l Bank v. Field, 126 Mass. 345. 460		Merritt v. Pearson, 76 Ind. 44. 358	
Maher v. Martin, 43 Ind. 314. 477		Merritt, In re, 5 Paige, 125. 224	
Manhattan Cloak, etc., Co. v. Dodge, 120 Ind. 1. 494		Mescall v. Tully, 91 Ind. 96. 49	
Manhattan Manufacturing, etc., Co. v. Van Keuren, 23 N. J. Eq. 251. 590		Messick v. Midland R. W. Co., 128 Ind. 81. 355, 386	
Mann v. Belt R. R., etc., Co., 128 Ind. 138. 100, 520		Metty v. Marsh, 124 Ind. 18. 147	
Mansfield v. Shipp, 128 Ind. 55. 358		Midland R. W. Co. v. Fisher, 125 Ind. 19. 388	
Marion Tp., etc., Co. v. Norris, 37 Ind. 424. 63		Midland R. W. Co. v. Smith, 113 Ind. 233. 83	
Mark v. Murphy, 76 Ind. 534. 83		Millar v. Farrar, 2 Blackf. 219. 259	
Markley v. Rudy, 115 Ind. 533. 396		Miller v. Cook, 124 Ind. 101. 192	
Martin v. Beasley, 49 Ind. 280. 363		Miller v. Evansville Nat'l Bank, 99 Ind. 272. 256	
Martin v. Reed, 30 Ind. 218. 515		Miller v. Shields, 124 Ind. 166. 22	
Martindale v. Martindale, 10 Ind. 566. 376		Million v. Board, etc., 89 Ind. 5. 76	
		Minnesota v. Barber, 136 U. S. 313. 582, 589, 600	
		Missouri River, etc., R. R. Co. v. Morris, 7 Kan. 210. 72	

Mitchell v. Chambers, 55 Ind. 289. 174	Nickerson v. Nickerson, 28 Md. 327. 92
Mitchell v. Dickson, 53 Ind. 110. 515	Nixon v. Whilely, etc., Co., 120 Ind. 360. 22
Moffitt v. Moffitt, 69 Ill. 649. 457	Norris v. Casel, 90 Ind. 143. 292
Moffitt v. Roche, 76 Ind. 75. 53	Northern Pacific, etc., R. R. Co. v. Herbert, 116 U. S. 642. 203
Monnett v. Hemphill, 110 Ind. 299. 260	Nowling v. McIntosh, 89 Ind. 593. 127
Montgomery v. Pickering, 116 Mass. 227. 187	Noyes v. Humphreys, 11 Gratt. 636. 249
Moody v. Shaw, 85 Ind. 88. 364	Nugent v. Laduke, 87 Ind. 482. 458
Moore v. Board, etc., 59 Ind. 516. 516	Nye v. Hoyle, 120 N. Y. 195. 388
Moore v. Cottingham, 90 Ind. 239. 49	O'Daily v. Morris, 31 Ind. 111. 477
Moore v. Crose, 43 Ind. 30. 122	Ogle v. Stoops, 11 Ind. 380. 376
Moore v. Kessler, 59 Ind. 152. 17	Ohio, etc., R. R. Co. v. Tindall, 13 Ind. 366. 485
Moore v. Ware, 61 Miss. 206. 114	Ohio, etc., R. W. Co. v. Collarn, 73 Ind. 261. 141
Moorman v. Hudson, 125 Ind. 504. 328	Ohio, etc., R. W. Co. v. Hill, 117 Ind. 56. 100, 143, 520
Moreland v. Lemasters, 4 Blackf. 383. 479	Ohio, etc., R. W. Co. v. Nickless, 71 Ind. 271. 224
Moriarty v. Kent, 71 Ind. 601. 224	Ohio, etc., R. W. Co. v. Voight, 122 Ind. 288. 366
Morgan, etc., Co. v. Louisiana Board, etc., 118 U. S. 455. 573	Ohio, etc., R. W. Co. v. Walker, 113 Ind. 196. 173
Morrill v. Wabash, etc., R. W. Co., 96 Mo. 174. 47	Ohning v. City of Evansville, 66 Ind. 59. 131
Morrison v. Jacoby, 114 Ind. 84. 316, 342	Oroville, etc., R. R. Co. v. Supervisors, etc., 37 Cal. 354. 228
Morrow v. U. S. Mortg. Co., 96 Ind. 21. 54	Orr v. Owens, 128 Ind. 229. 213, 359
Morse v. Royal, 12 Vets. 355. 187	Orr v. White, 106 Ind. 341. 22
Morton v. State, 1 Lea, 498. 162	Orton v. Tilden, 110 Ind. 131. 358
Mount Holly, etc., T. P. Co. v. Ferree, 17 N. J. Eq. 117. 460	Osborn v. Sutton, 108 Ind. 443. 76
Mowbray v. State, ex rel, 88 Ind. 324. 130	Onachita, etc., v. Aiken, 121 U. S. 444. 573
Mugler v. Kansas, 123 U. S. 623. 566, 589	Over v. Shannon, 75 Ind. 352. 84, 355, 386
Muir v. Berkshire, 52 Ind. 149. 54	Owens v. Childs, 58 Ala. 113. 114
Munger v. Green, 20 Ind. 38. 61	Owens v. Holland Purchase Ins. Co., 56 N. Y. 565. 374
Municipality No. 2 v. Orleans Cotton Press, 18 La. 123. 381	Owings v. Bates, 9 Gill, 463. 515
Munn v. Illinois, 94 U. S. 113. 573	Packard v. Ames, 16 Gray, 327. 43
Musselman v. Cravens, 47 Ind. 1. 265	Page v. Palmer, 48 N. H. 385. 47
Nagel v. Missouri Pac. R. W. Co., 75 Mo. 665. 574	Paine v. Lake Erie, etc., R. R. Co., 31 Ind. 283. 269
Nashville, etc., R. W. Co. v. Alabama, 128 U. S. 96. 580	Palmer v. Blain, 55 Ind. 11. 249
Neal v. State, ex rel., 49 Ind. 51. 211	Palmer v. Stumph, 29 Ind. 329. 70, 538
Neblett v. Macfarland, 92 U. S. 101. 186	Panama, The, Deady, 27. 580
Needham v. Gillett, 39 Mich. 573. 515	Parish v. Kaspere, 109 Ind. 586. 122
Nelson v. Harrington, 1 Law Rep. Ann. 719. 421	Parker v. Indianapolis Nat'l Bk., 126 Ind. 595. 37, 324
Nelson v. State, 8 N. H. 163. 163	Paschall v. Passmore, 15 Pa. St. 295. 43
New Albany, etc., R. R. Co. v. Peterson, 14 Ind. 112. 590	Patterson v. Churchman, 122 Ind. 379. 366
Newcomer v. Hutchings, 96 Ind. 119. 64	Patterson v. Kentucky, 97 U. S. 501. 578
New Jersey v. Yard, 95 U. S. 104. 529	
New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650. 529, 541, 566	

TABLE OF CASES CITED.

xv

Payne v. Powell, 5 Bush, 248.	93	Pittsburgh, etc., R. W. Co. v. Sp-	
Pendleton, etc., T. P. Co. v. Bar-		nier, 85 Ind. 165.	465
nard, 40 Ind. 146.	308	Pittsburgh, etc., R. W. Co. v.	
Pennsylvania Co. v. Stegemeier,		Vining, 27 Ind. 513.	485
118 Ind. 305.	520	Pollard v. Barkley, 117 Ind. 40.	363
Pennsylvania, etc., R. R. Co. v.		Pond v. Sweetser, 85 Ind. 144.	151
Righter, 42 N. J. L. 180.	143	Portland Stone-ware Co. v. Tay-	
Pennsylvania R. R. Co. v. Miller,		ler, 19 Atl. R. 1086.	227
132 U. S. 75.	535	Pouder v. Tate, 76 Ind. 1.	83
People v. Alibez, 49 Cal. 452.	163	Pouder v. Tate, 96 Ind. 330.	370
People v. Central Pacific R. R.		Powell v. Pennsylvania, 127 U. S.	
Co., 43 Cal. 398.	72	678.	564
People v. Saunders, 4 Parker		Powers v. Fletcher, 84 Ind. 154.	406
Crim. C. 196.	163	Prather v. Hart, 17 Neb. 598.	130
People v. Wasson, 65 Cal. 138.	163	Pratt v. Allen, 95 Ind. 404.	358
People v. Yoakum, 53 Cal. 566.	163	Pratt v. Taunton Copper Mfg. Co.,	
People, ex rel., v. Common Coun-		123 Mass. 110.	461
cil, etc., 77 N. Y. 503.	130	Presbyterian, etc., Fund v. Allen,	
People, ex rel., v. Draper, 15 N.		106 Ind. 593.	373
Y. 532.	72	Presser v. Illinois, 116 U. S. 252.	580
People, ex rel., v. Green, 58 N.		Pressley v. Harrison, 102 Ind. 14.	370
Y. 295.	130	Prigg v. Pennsylvania, 16 Pet.	
People, ex rel., v. McCarthy, 102		539.	577
N. Y. 630.	234	Puckett v. Bates, 4 Ala. 390.	249
People, ex rel., v. Nordheim, 99		Pulse v. Miller, 81 Ind. 190.	246
Ill. 553.	17	Quarl v. Abbott, 102 Ind. 233.	323
People, ex rel., Schiellein, 95 N.		Quenton v. Burton, 61 Iowa, 471.	590
Y. 124.	17	Quong Wo, In re, 13 Fed. Rep.	
People, ex rel., v. Supervisors, 17		229.	564
N. Y. 235.	568		
People, ex rel., v. Sutherland, 41		Railroad Co. v. Richmond, 96 U.	
Mich. 177.	19	S. 521.	566
Pernam v. Wead, 2 Mass. 203.	121	Railroad Co. v. Stout, 17 Wall.	
Personette v. Johnson, 40 N. J.		657.	142
Eq. 173.	114	Raley v. County of Umatilla, 15	
Peters v. Griffee, 108 Ind. 121.	76	Ore. 172.	43
Petry v. Ambroscher, 100 Ind.		Randall v. Silverthorn, 4 Pa. St.	
510.	188	173.	122
Pettis v. Johnson, 56 Ind. 139.	382	Rawson v. Inhabitants, etc., 7	
Phillips v. State, 85 Tenn. 551.	162	Allen, 125.	43
Phoenix Ins. Co. v. Tomlinson,		Record v. Ketcham, 76 Ind. 482.	271
125 Ind. 84.	32	Reed v. Earhart, 88 Ind. 159.	156
Physio-Medical College v. Wil-		Regina v. Morris, 10 Cox C. C.	
kinson, 89 Ind. 23.	257	480.	163
Physio-Medical College, etc., v.		Reisterer v. Carpenter, 124 Ind. 30.	537
Wilkinson, 108 Ind. 314.	265	Reynolds v. Faris, 80 Ind. 14.	76
Pickering v. State, 106 Ind. 228.	515	Reynolds v. Schultz, 106 Ind. 291.	147
Pickett v. Green, 120 Ind. 584.	537	Rhine v. Morris, 96 Ind. 81.	156
Pierce v. Wilson, 34 Ala. 596.	186	Rice v. Morris, 82 Ind. 204.	54
Pierson v. Hammond, 22 Texas,		Richter v. Richter, 111 Ind. 456.	135
585.	212	Rittenhouse v. Kemp, 37 Ind. 258.	137
Pippin v. Sheppard, 11 Price, 400.	421	Robbins v. Magee, 76 Ind. 381.	83
Pittsburgh, etc., R. R. Co. v.		Robinius v. Lester, 30 Ind. 142.	389
Spencer, 98 Ind. 186.	99, 414, 417	Robinson v. Thrailkill, 110 Ind.	
Pittsburgh, etc., R. W. Co. v.		117.	121
Adams, 105 Ind. 151.	205, 417	Rockhill v. Nelson, 24 Ind. 422.	376
Pittsburgh, etc., R. W. Co. v.		Rogers v. Leyden, 127 Ind. 50.	101
Gilleland, 56 Pa. St. 445.	220	Rogers v. Union Cent. Life Ins.	
Pittsburgh, etc., R. W. Co. v.		Co., 111 Ind. 343.	22, 323
Martin, 82 Ind. 476.	143, 521		

Rominger v. Simmons, 88 Ind. 453.....	147	Sharkey v. McDermott, 16 Mo. App. 80.....	478
Ronan v. Meyer, 84 Ind. 390.....	271	Shean v. Philips, 1 F. & F. 449.....	172
Rooker v. Benson, 83 Ind. 250.....	137	Sherlock v. Alling, 93 U. S. 99.....	573
Rosa v. Prather, 103 Ind. 191.....	213	Shirk v. Board, etc., 106 Ind. 573.....	122
Ross v. Draper, 55 Vt. 404.....	90	Shoemaker v. Board, etc., 36 Ind. 175.....	339
Ross v. Thompson, 78 Ind. 90.....	122	Shorb v. Kinzie, 80 Ind. 500.....	472
Rowan v. Town of Portland, 8 B. Mon. 242.....	383	Shower v. Pilck, 4 Exchequer, 478.....	92
Rowe v. Beckett, 30 Ind. 154.....	380	Shuee v. Shuee, 100 Ind. 477.....	187
Rowe v. Lewis, 30 Ind. 163.....	271	Shular v. Shular, 56 Ind. 30.....	257
Roy v. Rowe, 90 Ind. 54.....	446	Siebert v. State, 95 Ind. 471.....	160
Ruger v. Bungan, 10 Ind. 451.....	465	Siebold, Ex parte, 100 U. S. 371.....	580
Rumsey v. Berry, 65 Me. 570.....	426	Simmon v. Larkin, 82 Ind. 385.....	292
Rundles v. Jones, 3 Ind. 35.....	259	Sims v. City of Frankfort, 79 Ind. 446.....	84, 382, 386
Rupert v. Morton, 19 Ind. 313.....	265	Singer Mfg. Co. v. Forsyth, 108 Ind. 334.....	373, 537
Rushville, etc., Co. v. City of Rushville, 121 Ind. 206.....	341	Sioux City Street R. W. Co. v. Sioux City, 138 U. S. 98.....	540
Sage v. State, 127 Ind. 15.....	340	Slaughter-House Cases, 16 Wall. 36.....	564, 579
Salem Turnpike v. County of Essex, 100 Mass. 282.....	72	Smith v. Alabama, 124 U. S. 465.....	580
Salisbury Mills v. Townsend, 109 Mass. 115.....	460	Smith v. Coleman, 77 Wis. 343.....	260
Sanders v. Weelburg, 107 Ind. 266.....	137, 292	Smith v. Cottrell, 94 Ind. 379.....	393
Sangamon, etc., R. R. Co. v. County of Morgan, 14 Ill. 163.....	72	Smith v. Dorsey, 38 Ind. 451.....	88
Sanxay v. Hunger, 42 Ind. 44.....	122	Smith v. Ferguson, 90 Ind. 229.....	93
Saulet v. Shepherd, 4 Wallace, 502.....	381	Smith v. Martin, 80 Ind. 260.....	52
Scantlin v. Garvin, 46 Ind. 265.....	45	Smith v. Smith, 97 Ind. 273.....	147
Scheible v. Slagle, 89 Ind. 323.....	465	Smith v. Wells, 20 Howard Prac. Rep. 158.....	368
Scherer v. Ingerman, 110 Ind. 428.....	117, 511	Snowden v. Wilas, 19 Ind. 10.....	83
Schlicht v. State, 56 Ind. 173.....	564	Sohier v. Trinity Church, 109 Mass. 1.....	74
Schneider v. Piessner, 54 Ind. 524.....	516	Sondheim v. Gilbert, 117 Ind. 71.....	426
Schnurr v. Stults, 119 Ind. 429.....	466	Southard v. Central R. R. Co., 2 Dutch. 13.....	47
Schofield v. Chicago, etc., R. W. Co., 114 U. S. 615.....	141	Southern Kansas, etc., R. W. Co. v. Rice, 38 Kansas, 398.....	352
School District v. Root, 61 Mich. 373.....	20	Southside R. R. Co. v. Daniel, 20 Grattan, 344.....	220
Scobey v. Ross, 13 Ind. 117.....	494	Spence v. Board, etc., 117 Ind. 573.....	57
Scott v. Stipe, 12 Ind. 74.....	45	Stafford v. Cronkhite, 114 Ind. 220.....	256
Scotton v. Mann, 89 Ind. 404.....	358	Staley v. Jameson, 46 Ind. 159.....	421
Screven v. Clark, 48 Ga. 41.....	224	Stanley v. Colt, 5 Wall. 119.....	44
Second Nat'l Bank v. Corey, 94 Ind. 457.....	231	Stanton v. State, ex rel., 74 Ind. 503.....	156
Security Co. v. Arbuckle, 119 Ind. 69.....	22	State v. Addington, 77 Mo. 110.....	566
Sedgwick v. Tucker, 90 Ind. 271.....	329	State v. Elder, 65 Ind. 282.....	163
Seebold v. Shitler, 34 Pa. St. 133.....	46	State v. Hayes, 78 Mo. 307.....	564, 573
Sext v. Geise, 80 Ga. 698.....	248	State v. Hattabough, 66 Ind. 223.....	163
Seymour v. Lewis, 13 N. J. Eq. 439.....	121	State v. Klein, 126 Ind. 68.....	600
Shackman v. Little, 87 Ind. 181.....	57	State v. Mayor, etc., 8 Lawyers' Rep. Ann. 697.....	131
Shaeffer v. Sleade, 7 Blackf. 178.....	186	State v. McKinnon, 8 Oregon, 485.....	19
Shaffer v. Ryan, 84 Ind. 140.....	249	State v. Mott, 61 Md. 297.....	590
Sharkey v. McDermott, 91 Mo. 647.....	478	State v. Nelson, 29 Me. 329.....	160
		State v. Penny, 19 S. C. 218.....	580

TABLE OF CASES CITED.

xvii

State v. Thurston, 2 McMullan, 382.....	162	Stebbins v. Goldthwait, 31 Ind. 159.....	515
State v. Weil, 89 Ind. 286.....	160	Steel v. Grigsby, 79 Ind. 184.....	120
State v. Wenzel, 77 Ind. 428.....	515	Stefani v. State, 124 Ind. 3.....	509
State v. Woodward, 89 Ind. 110.....	566	Stehman v. Crull, 26 Ind. 436.....	380
State v. Wordin, 56 Conn. 216.....	564	Stephens v. Benson, 19 Ind. 367.....	83
State, ex rel., v. Adams, 65 Ind. 393.....	482	Sterne v. Bank of Vincennes, 79 Ind. 549.....	328
State, ex rel., v. Allen, 21 Ind. 516.....	130	Sterne v. McKinney, 79 Ind. 578.....	328
State, ex rel., v. Board, etc., 4 Ind. 495.....	227	Sterne v. Vert, 111 Ind. 408.....	260
State, ex rel., v. Board, etc., 125 Ind. 247.....	299	Stevens v. Burgess, 61 Me. 89.....	114
State, ex rel., v. Corrigan, etc., Street R. W. Co., 85 Mo. 263.....	529	Stewart v. Babbs, 120 Ind. 568.....	22
State, ex rel., v. Davis, 17 Minn. 429.....	228	Stewart v. Hartman, 46 Ind. 331.....	120
State, ex rel., v. Gallagher, 81 Ind. 558.....	482	Stewart v. State, 111 Ind. 554.....	160
State, ex rel., v. Gibbs, 13 Fla. 55.....	17	Stewart v. Weed, 11 Ind. 92.....	346
State, ex rel., v. Haworth, 122 Ind. 462.....	562	Stickrod v. Commonwealth, 86 Ky. 285.....	566
State, ex rel., v. Hook, 6 Blackf. 515.....	57	Stiger v. Bent, 111 Ill. 328.....	54
State, ex rel., v. Indiana, etc., Co., 120 Ind. 575.....	564, 586	St. John v. Hendrickson, 81 Ind. 350.....	185
State, ex rel., v. Johnson, 100 Ind. 489.....	482	St. Louis, etc., R. W. Co. v. Mathias, 50 Ind. 65.....	143, 520
State, ex rel., v. Jones, 19 Ind. 356.....	130	Stockwell v. Brant, 97 Ind. 474.....	292
State, ex rel., v. Kamp, 111 Ind. 56.....	260	Stoddard v. Johnson, 75 Ind. 20.....	76
State, ex rel., v. Kelso, 94 Ind. 587.....	364	Stone v. Mississippi, 101 U. S. 814.....	566
State, ex rel., v. Krug, 82 Ind. 58.....	156	Stout v. Curry, 110 Ind. 514.....	358
State, ex rel., v. McGinnis, 34 Ind. 452.....	339	Stout v. McPheeters, 84 Ind. 585.....	380
State, ex rel., v. Noble, 118 Ind. 350.....	18	Stout v. Woods, 79 Ind. 108.....	515
State, ex rel., v. Peacock, 15 Neb. 442.....	17	Stovall v. Johnson, 17 Ala. 14.....	485
State, ex rel., v. Reitz, 62 Ind. 159.....	69	Stowe v. Kimball, 28 Ill. 93.....	457
State, ex rel., v. Ruhlman, 111 Ind. 17.....	292	Strieb v. Cox, 111 Ind. 299.....	76, 238
State, ex rel., Shaack, 28 Minn. 358.....	228	Strong v. State, ex rel., 75 Ind. 440.....	131
State, ex rel., v. Slick, 86 Ind. 501.....	228	Stropes v. Board, etc., 72 Ind. 42.....	414
State, ex rel., v. Stearns, 11 Neb. 104.....	17	Stubley v. London, etc., R. W. Co., L. R. I. Ex. 13.....	143
State, ex rel., v. Trustees, 114 Ind. 389.....	227	Stumph v. Bauer, 76 Ind. 157.....	414
State, ex rel., v. Wilkinson, 23 Neb. 710.....	19	Sullivan v. Learned, 49 Ind. 252.....	318
State, ex rel., v. Woodruff Sleeping, etc., Co., 114 Ind. 155.....	590	Sullivan v. O'Conner, 77 Ind. 149.....	465
State, ex rel., v. Younts, 89 Ind. 313.....	116	Summers v. Tarney, 123 Ind. 560.....	355
Stater v. Hill, 10 Ind. 176.....	479	Sumner v. State, 5 Blackf. 579.....	195
		Suydam v. Jones, 10 Wend. 180.....	388
		Swaby v. Dickson, 5 Sim. 629.....	224
		Sweeney, Ex parte, 126 Ind. 583.....	37, 323
		Sweetser v. Odd Fellows, etc., Ass'n, 117 Ind. 97.....	29
		Talbot v. Marshfield, 2 Dr. & Sm. 549.....	172
		Taylor v. Board, etc., 120 Ind. 121.....	274
		Taylor v. Fickas, 64 Ind. 167.....	590
		Taylor v. Phillips, 30 Vt. 238.....	515
		Taylor v. Taylor, 8 B. Mon. 419.....	113
		Teat v. State, 53 Miss. 439.....	163
		Tennessee v. Davis, 100 U. S. 257.....	580
		Terre Haute, etc., R. R. Co. v. Buck, 96 Ind. 346.....	465

Terre Haute, etc., R. R. Co. v. Clark, 73 Ind. 168.	143, 520	Wabash, etc., R. W. Co. v. Locke, 112 Ind. 404.	141
Terre Haute, etc., R. R. Co. v. Rodel, 89 Ind. 128.	380	Wabash, etc., R. W. Co. v. Rooker, 90 Ind. 581.	57
Test v. Larsh, 76 Ind. 452.	260	Wagoner v. Wilson, 108 Ind. 210.	366
Thames, etc., Co. v. Beville, 100 Ind. 309.	476	Walker v. Crews, 73 Ala. 412.	90
Thomas v. Merry, 113 Ind. 83.	49	Walker v. Diehl, 79 Ill. 473.	114
Thomas v. Winters, 12 Ind. 322.	369	Wall v. Home Ins. Co., 36 N. Y. 157.	32
Thompson v. Lowe, 111 Ind. 272.	84, 386	Wallace v. Long, 105 Ind. 522.	475
Thompson v. Parker, 83 Ind. 96.	116	Walling v. Michigan, 116 U. S. 446.	581
Thornton v. Trammell, 39 Ga. 202.	47	Walling v. People, etc., 116 U. S. 446.	590
Thorogood v. Bryan, 8 C. B. 115.	99	Wallis v. Cooper, 123 Ind. 40.	510
Thorp v. Hanes, 107 Ind. 324.	377	Walworth v. Abel, 52 Pa. St. 370.	515
Thurman v. James, 48 Mo. 235.	182	Warburton v. Crouch, 108 Ind. 83.	257
Toledo, etc., R. W. Co. v. Brannagan, 75 Ind. 490.	100	Ward v. Berkshire Life Ins. Co., 108 Ind. 301.	22
Toledo, etc., R. W. Co. v. Goddard, 25 Ind. 185.	520	Ward v. Swift, 6 Hare, 312.	224
Tomlinson v. Briles, 101 Ind. 538.	246	Ware v. Stephenson, 10 Leigh, 155.	249
Town of Kissingmsee City v. Cannon, 7 So. R. 523.	131	Warey v. Forst, 102 Ind. 205.	22
Town of Knightstown v. Musgrove, 116 Ind. 121.	99	Warren v. Mayor, etc., 22 Iowa, 351.	45
Travis v. Barkhurst, 4 Ind. 171.	465	Wartena v. State, 105 Ind. 445.	509
Truitt v. Truitt, 37 Ind. 514.	257	Waters v. Bishop, 122 Ind. 516.	446
Turner v. Maryland, 107 U.S. 38.	579	Watson v. Mahan, 20 Ind. 223.	479
Tyrell v. Bank of London, 10 H. L. Cas. 26.	494	Wattles v. City, etc., 40 Mich. 624.	234
Udderzook's Case, 76 Pa. St. 340.	574	Waymire v. Lank, 121 Ind. 1.	385
Underwood v. Linton, 54 Ind. 468.	173	Weaver v. Roth, 105 Pa. St. 408.	515
United States v. Dewitt, 9 Wall. 41.	577	Webber v. Virginia, 103 U. S. 348.	579
United States v. Nourse, 9 Pet. 8.	212	Webster v. Gilmore, 91 Ill. 324.	19
United States, ex rel., v. Board, etc., 28 Fed. Rep. 407.	227	Weir v. State, ex rel., 96 Ind. 311.	84
Updegraff v. Palmer, 107 Ind. 181.	147	Weiss v. Guerinneau, 109 Ind. 438.	54
Vail v. Halton, 14 Ind. 344.	231	Welsh v. State, 126 Ind. 71.	566
Vance v. Workman, 8 Blackf 306.	277	Welton v. State, 91 U. S. 275.	581
Van Cleave v. Milliken, 13 Ind. 105.	231	Welz v. Rhodius, 87 Ind. 1.	536
Van Duyne v. Vreeland, 12 N. J. Eq. 142.	476	West v. Raymond, 21 Ind. 305.	494
Van Tine v. Van Tine, 13 Cen. Rep. 354.	478	Western Union Tel. Co. v. Brown, 108 Ind. 538.	415, 417
Vaughan v. Commonwealth, 2 Va. Cases, 273.	163	Western Union Tel. Co. v. Pendleton, 122 U. S. 347.	572
Veach v. Pierce, 6 Ind. 48.	259	West Philadelphia, etc., R. W. Co. v. City of Philadelphia, 10 Phila. 70.	530
Vert v. Voss, 74 Ind. 565.	54	West Virginia, etc., Co. v. Volcanic Co., 5 W. Va. 382.	586
Vigil v. Pradt, 20 Pac. Rep. 795.	179	Weyer v. Second Nat'l Bank, 57 Ind. 198.	456
Vigo Tp. v. Board, etc., 111 Ind. 170.	239	Wheatley v. Baugh, 23 Pa. St. 528.	590
Village of Des Plaines v. Poyer, 123 Ill. 348.	276	White v. Chicago, etc., R. R. Co., 122 Ind. 317.	220
Vinton v. Baldwin, 95 Ind. 433.	384	White v. Clawson, 79 Ind. 188.	230
Vogel v. Leichner, 102 Ind. 55.	22	White v. Fleming, 114 Ind. 560.	76, 237
		White v. Stanton, 111 Ind. 540.	61
		Whitehall v. State, ex rel., 19 Ind. 30.	510
		Whitesides v. Hunt, 97 Ind. 191.	426

TABLE OF CASES CITED.

xix

Whittlesey v. Fuller, 11 Conn. 337.....	96	Wood v. Wood, 124 Ind. 545.....	429
Wier v. Simmons, 55 Wis. 637....	43	Woodard v. New York, etc., R. R. Co., 106 N. Y. 369.....	521
Wilcox v. Monday, 83 Ind. 335....	111	Woodfill v. Patton, 76 Ind. 575....	414
Wilcox v. Rome, etc., R. R. Co., 39 N. Y. 358.....	143	Wood, In re, 71 Mo. 623.....	104
Willetts v. Ridgway, 9 Ind. 367....	513	Worley v. Moore, 97 Ind. 15.....	185
Williams v. Forbes, 114 Ill. 167....	92	Wright v. Wilson, 95 Ind. 408....	314
Williams v. Perrin, 73 Ind. 57....	456	Wright v. Wright, 72 Ind. 149....	512
Williams v. Riley, 88 Ind. 290....	515	Wright v. Wright, 97 Ind. 444....	231
Williams v. Segur, 106 Ind. 368....	498	Wyman v. Phoenix, etc., Ins. Co., 119 N. Y. 274.....	30
Williams v. Tobias, 37 Ind. 345....	510	Wynn v. Lord Newborough, 3 Bro. C. C. 88.....	224
Williams v. Whedon, 109 N. Y. 333.....	149	Yeoman v. Mueller, 33 Mo. App. 343.....	249
Williams v. Williams, 13 Ind. 523.....	318	Yick Wo v. Hopkins, 6 Sup. Ct. Rep. 1064.....	564
Williams v. Williams, 81 Ind. 113.....	606	Yoakum v. Tilden, 3 W. Va. 167.....	260
Williamson v. Kokomo, etc, Assn., 89 Ind. 389.....	489	Yonkey v. State, ex rel., 27 Ind. 236.....	130
Willis v. Thompson, 93 Ind. 62....	329	Young v. French, 35 Wis. 111....	249
Wills v. Ross, 77 Ind. 1.....	476	Young v. Sellers, 106 Ind. 101....	76
Wilson v. Ensworth, 85 Ind. 399....	116		
Wilson v. McNamee, 102 U. S. 572.....	580	Zell v. Universalist Society, 119 Pa. St. 390.....	122
Winchester, etc., Co. v. Carman, 109 Ind. 31.....	369	Zimmerman v. Streeper, 75 Pa. St. 147.....	97
Wolfe v. Pugh, 101 Ind. 293.....	57		
Wood v. Northwestern Ins. Co., 46 N. Y. 421.....	564		

STATUTES CITED AND CONSTRUED.

Const., Art. 1, section 21.....	274	Section 3071, R. S. 1881.....	234
Const., Art. 2, section 13.....	18	Section 3072, R. S. 1881.....	234
Const., Art. 4, section 22.....	68	Section 3157, R. S. 1881.....	234
Const., Art. 6, section 3.....	19	Sections 3254-3260, R. S. 1881.....	235
Const., Art. 10, section 1.....	68	Section 3903, R. S. 1881.....	107
Const., Art. 15, section 3.....	481	Section 3906, R. S. 1881.....	37
Section 266, R. S. 1881.....	484	Section 3907, R. S. 1881.....	37
Section 273, R. S. 1881.....	57	Section 4152, R. S. 1881.....	456
Section 278, R. S. 1881.....	506	Section 4243, R. S. 1881.....	243
Section 284, R. S. 1881.....	484	Section 4275, R. S. 1881.....	401
Section 293, R. S. 1881.....	211	Section 4285, et seq., R. S. 1881.....	395
Section 293, Clause 3, R. S. 1881.....	230	Section 4294, R. S. 1881.....	146
Section 391, R. S. 1881.....	32	Section 4736, R. S. 1881.....	17
Section 497, R. S. 1881.....	171	Section 4760, R. S. 1881.....	175
Section 533, Clause 6, R. S. 1881.....	430	Section 4761, R. S. 1881.....	176
Section 590, R. S. 1881.....	506	Section 4765, R. S. 1881.....	182
Section 629, R. S. 1881.....	358	Section 4913, R. S. 1881.....	317
Section 658, R. S. 1881.....	56, 292	Section 4950, R. S. 1881.....	429
Section 715, R. S. 1881.....	152	Section 5117, R. S. 1881.....	24
Section 756, R. S. 1881.....	229	Section 5991, R. S. 1881.....	481
Section 968, R. S. 1881.....	260	Section 6046, et seq., R. S. 1881.....	149
Section 997, R. S. 1881.....	398	Section 6050, R. S. 1881.....	166
Section 1045, R. S. 1881.....	523	Section 6060, R. S. 1881.....	96
Section 1055, R. S. 1881.....	436	Section 6290, R. S. 1881.....	343
Section 1064, R. S. 1881.....	255	Section 6305, R. S. 1881.....	342
Section 1066, R. S. 1881.....	392	Section 6308, R. S. 1881.....	342
Section 1070, R. S. 1881.....	436	Section 6345, R. S. 1881.....	235
Section 1208, R. S. 1881.....	505	Section 6357, R. S. 1881.....	336, 344
Section 1210, R. S. 1881.....	597	Section 6358, R. S. 1881.....	344
Section 1211, R. S. 1881.....	597	Section 6359, R. S. 1881.....	344
Section 1280, R. S. 1881.....	182	Section 6395, R. S. 1881.....	362
Section 2091, R. S. 1881.....	291	Section 6397, R. S. 1881.....	338
Section 2227, R. S. 1881.....	510	Section 6398, R. S. 1881.....	338
Sections 2275-2289, R. S. 1881.....	456	Section 6416, R. S. 1881.....	498
Section 2332, R. S. 1881.....	114	Section 6491, R. S. 1881.....	594
Section 2378, R. S. 1881.....	114	Section 6496, R. S. 1881.....	155
Section 2395, R. S. 1881.....	362	Elliott's Supp., section 284.....	180
Section 2403, R. S. 1881.....	104, 362	(Acts 1885, p. 114.)	
Section 2683, R. S. 1881.....	148	Elliott's Supp., section 359.....	600
Section 2697, R. S. 1881.....	322	(Acts 1889, p. 150.)	
Section 2774, R. S. 1881.....	502	Elliott's Supp., section 382.....	509
Section 2776, R. S. 1881.....	502	(Acts 1883, p. 151.)	
Sections 2880-2884, R. S. 1881.....	298	Elliott's Supp., section 389.....	512
Section 2885, R. S. 1881.....	299	(Acts 1883, p. 155.)	

STATUTES CITED AND CONSTRUED. xxi

Elliott's Supp., section 753440	1 G. & H., p. 411, section 18434
(Acts 1885, p. 207.)	2 G. & H., p. 20, section 5158
Elliott's Supp., section 794488	2 G. & H., p. 249, section 466229
(Acts 1883, p. 85.)	2 G. & H., p. 299, section 65062
Elliott's Supp., section 1184401	1 R. S. 1876, p. 428, section 2307
(Acts 1886, p. 129.)	1 R. S. 1876, p. 757, section 10456
Elliott's Supp., section 1193.107, 396	2 R. S. 1876, p. 509, section 48456
(Acts 1885, p. 141.)	2 R. S. 1876, p. 510457
Elliott's Supp., section 1391481	2 R. S. 1876, p. 512, section 60456
(Acts 1889, p. 425.)	Acts 1817, p. 11542
Elliott's Supp., section 1395493	Acts 1869, (Sp. ses.), p. 27300
(Acts 1889, p. 344.)	Acts 1875, p. 97311
Elliott's Supp., section 1598334	Acts 1881, p. 87300
(Acts 1885, p. 37.)	Acts 1881, p. 656338
Elliott's Supp., section 169062	Acts 1883, p. 161363
(Acts 1883, p. 141.)	Acts 1883, p. 173402
Elliott's Supp., section 2127338	Acts 1883, p. 176, section 3401
(Acts 1889, p. 367.)	Acts 1883, p. 192402
Elliott's Supp., section 2129498	Acts 1885, p. 129400
(Acts 1889, p. 341.)	Acts 1889, p. 27666
	Acts 1889, p. 367338
	Acts 1891, p. 3936
	Acts 1891, p. 89557, 585

JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. WALTER OLDS. * †
HON. SILAS D. COFFEY. ** †
HON. BYRON K. ELLIOTT. †
HON. ROBERT W. McBRIDE. §
HON. JOHN D. MILLER. ||

* Chief Justice at the November Term, 1890.

† Term of office commenced January 7th, 1889.

** Chief Justice at the May Term, 1891.

† Term of office commenced January 3d, 1887.

‡ Appointed December 17th, 1890, to succeed Hon. Joseph A. S. Mitchell.

|| Appointed February 25th, 1891, to succeed Hon. John G. Berkshire.

(xxii)

OFFICERS
OF THE
SUPREME COURT.

CLERK,
ANDREW M. SWEENEY.

SHERIFF,
JAMES L. YATER.

LIBRARIAN,
WILLIAM W. THORNTON.



C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1890, IN THE SEVENTY-
FIFTH YEAR OF THE STATE.

No. 14,772.

NEELY ET AL. v. BOYCE ET AL.

WILL. — *Life-Estate. — Power of Sale.* — A testator devised all his real estate to his wife "for and during the time of her natural life," with directions to her to conduct the farming operations thereon in the same manner as the testator would do if he were still living, with a view of keeping their children "together at home so long as they may be under the age of twenty-one years, and may desire to remain," with a gift to her of all the interest on his money, and other annual profits of his "estate for her maintenance and the support" of their family "so long as she shall live;" and provided that at her death all his realty and personalty remaining should be divided among their children, share and share alike; and also provided that, in order to pay debts, costs of administration, or for the payment of any sum given by the will, the executors could sell and convey at any time, without an order of court, on such terms as they saw fit, any of the real or personal property of the testator, except the home farm, unless in case of the most absolute necessity.

Held, that the will vested in the wife a life-estate in the land and the fee in the children, subject to be divested only in case a sale became necessary to pay debts, costs of administration, or any sum provided by the will to be paid.

Neely *et al.* v. Boyce *et al.*

DEED.—*Warranty.*—*Estoppel.*—*Subsequently Acquired Title.*—Any subsequently acquired title by a grantor in a warranty deed to the premises conveyed by him inures to the benefit of the grantee, and such grantor is estopped to claim title thereto.

From the Delaware Circuit Court.

C. E. Shipley, R. S. Gregory and A. C. Silverburg, for appellants.

J. R. McMahan and E. M. White, for appellees.

OLDS, C. J.—The appellee James Boyce brought this suit by filing his complaint in the court below against Charles F. W. Neely, Sarah E. Neely, his wife, and Mary A. Neely, in which it is alleged that on the 7th day of November, 1885, Charles F. W. Neely, by his promissory note, promised to pay to the order of N. F. Ethel, one year after date, the sum of \$1,500, with 8 per cent. interest and 5 per cent. attorney's fees; that on said date, by his certain other note, he promised to pay to said Ethel, two years after date, the sum of \$2,000, with 8 per cent. interest, and 5 per cent. thereon for attorney's fees, and that each of said notes was endorsed by the plaintiff, James Boyce, under and by the name and style of James Boyce & Co.; that on said same date said defendant Charles F. W. Neely, by his certain other note, promised to pay the plaintiff, Boyce, in four years after date, the sum of \$2,500, with five per cent. thereon for attorney's fees, and eight per cent. interest thereon, payable annually from date; that each of said notes was made payable at the Citizens' National Bank of Muncie, Indiana—copies of each are filed with and made a part of the complaint, marked, respectively, exhibits A, B, and C; that at the time of the execution of the notes said defendant Charles F. W. Neely executed a mortgage to the plaintiff, Boyce, to secure the payment of said note, for \$2,500, when the same should become due, and to indemnify him and secure him against any and all loss he might sustain by reason of having become indorser for said defendant Charles F. W. Neely on said two notes payable to the order of said Ethel—a copy of the mort-

Neely et al. v. Boyce et al.

gage is filed with and made a part of the complaint, marked "Exhibit D;" that said Charles F. W. Neely, by the terms of said mortgage, conveyed to the plaintiff, for the purpose thereof, the undivided seven-tenths ($\frac{7}{10}$) of the real estate therein described, and the whole of the personal property in said mortgage described; that said mortgage was duly recorded in the recorder's office of Delaware county, Indiana, on the 7th day of November, 1885; that said note for \$1,500 became due on the 10th day of November, 1886; that said defendant paid thereon the sum of \$620, and plaintiff, as indorser thereon, was compelled to pay and did pay thereon, the sum of \$1,000, the balance due on said note at said date, and the defendant has not repaid to him any part of said amount, except the sum of \$200, which sum he paid plaintiff on the 11th day of March, 1887; that there is now due the plaintiff thereon the sum of \$800, together with accrued interest; that after the execution of said note for \$2,000 to said Ethel, he, said Ethel, indorsed said note to plaintiff, a copy of which endorsement is filed with and made a part of the complaint, as shown by "Exhibit B;" that the plaintiff now holds and is the owner of said note; that the same is now due and wholly unpaid; that plaintiff paid for said note the sum of \$2,000 on the 2d day of April, 1886; that there is now due the plaintiff interest on the \$2,500 note the sum of \$200, which is wholly unpaid and no part of said note has been paid; that at the time of the execution of said notes and mortgage said defendant Charles F. W. Neely was unmarried; that he has since intermarried with his co-defendant Sarah E. Neely, who is now his wife, and is made a party hereto to answer as to any interest she may have or claim to have in said property, or any part thereof; that after the execution of the mortgage, and the marriage of said defendant Charles F. W. Neely, he executed a deed, in which his said wife joined, conveying the real estate described in said mortgage to their co-defendant Mary A. Neely; that said conveyance was made subject to said

Neely et al. v. Boyce et al.

mortgage lien, and said Mary A. Neely accepted said deed with the stipulation therein that she assumed the payment of said mortgage, and she is made a party hereto to answer as to any interest she may have in said real estate by virtue of said deed; that said real estate can not be sold in parcels without injury to the interests of the parties interested therein; that the personal property described in said mortgage is worth less than the amount of the indebtedness now due, and will not sell for enough on execution to pay said indebtedness now due and secured by said mortgage. Prayer for judgment for \$1,500 and the foreclosure of said mortgage, etc.

On their own application and motion, Laura C. Friend, Lenora J. Bergenthal, Sarah F. Russey, Cary O. Neely, Emma Neely, Cyrus G. Neely and Kate Neely were made parties defendant, and permitted to defend the suit.

The defendants Charles F. W. Neely and wife did not appear, and were defaulted.

Cyrus G. Neely and Sarah F. Russey each file a separate answer.

The first paragraph of the answer of Sarah F. Russey is a general denial. The second paragraph is an answer to so much of the complaint as seeks a foreclosure of the mortgage against the one undivided tenth part of said real estate, and she alleges that on the — day of January, 1868, one Moses L. Neely died at the county of Delaware, the owner in fee and in full possession of the real estate described in the complaint, leaving Mary A. Neely, his widow, and ten children him surviving, of whom said Sarah F. Russey is one, his only children and heirs at law; that said Moses L. Neely, at his death, left his last will and testament, duly executed, signed, sealed, published, and declared by him to be such, and attested on the 7th day of January, 1868, which will and testament was duly proved and admitted to probate on the 18th day of January, 1868, and recorded, etc., which will and probate thereof remain in full force

Neely et al. v. Boyce et al.

and validity ; that by said last will said testator disposed of his said real estate as follows :

"I give, bequeath and devise to my wife, Mary Ann Neely, as follows [describing the same]. For and during the time of her natural life, I give to her all my real estate, and I devise and direct that she shall conduct the farm operations upon my farm in the same manner as I should do were I still living, with that view, keeping our children together at home so long as they may be under the age of twenty-one years, and may desire to remain ; that I give to her all the interest upon my money, and all other annual profits of my estate, for her maintenance and the support of our family so long as she shall live." And he appointed his wife, Mary A. Neely, and his son, Cyrus G. Neely, joint executor and executrix of his said last will.

It was further provided by the will that "at the death of his wife all his estate, real and personal, remaining, shall be divided between their children, share and share alike," the child, or children, of such as may be deceased at that time to take the respective shares of their parents. It was also provided that, in order to pay debts, expenses of administration, or for the payment of any sum provided by the will, it should not be necessary for the executors, or either of them, to procure an order of sale of property from any court, or authority whatever, but they are fully authorized, in any manner, and at any time that they may deem fit, and on such terms as they may prescribe, to make sale of any of the real estate, or personal property, for such purpose ; but the home farm shall not, nor shall any part of it, be sold, except in case of the most absolute necessity.

The will further provided that the executors, and the survivors of them should remain such in order to hold the surplus of the personal estate until the decease of his widow. It is further alleged that the widow, Mary A. Neely, is yet living, and that in and by said will, and under the several devises and directions therein contained, and under the

Neely et al. v. Boyce et al.

provisions thereof, no interest, title, remainder, or estate, in and to the real estate named in said will vested in any of the children, or grandchildren of said testator at the death of said Moses L. Neely, and no title, interest, or estate, in possession, or in remainder, or expectancy, will vest in any of such children, or grandchildren, until the death of the said Mary A. Neely, his widow; that the real estate named in the complaint in this action, and in the mortgage therein set forth, is the same real estate named in said will as the home farm of said testator; that said defendant, under date of July 1, 1884, executed to the said Mary A. Neely a deed purporting to convey to said Mary A. Neely from the said Sarah F. Russey, as one of the ten equal heirs of said Moses L. Neely, deceased, the undivided one-tenth part of said real estate, said deed being recorded, etc.; that at the time she executed said deed this defendant was, and for more than ten years previous thereto had been, the wife of one James H. Russey, who did not sign nor execute, nor join with this defendant in the execution thereof, and said conveyance was and is void, and conveyed no title from this defendant, or to said Mary A. Neely; that afterwards, on July 31st, 1884, the said Mary A. Neely conveyed said undivided one-tenth of said real estate to said Charles F. W. Neely, as shown by deed recorded upon page 60 of book 54 of the deed records of said county; that said Charles F. W. Neely, by deed recorded on page 532 of book 54, executed a deed purporting to convey said undivided one-tenth of said real estate to Cyrus G. Neely, who, by deed recorded on page 18 of book 56 of the deed records of said county, under date of 1886, pretended to convey said undivided one-tenth of said real estate to said Charles F. W. Neely, who afterwards executed a deed purporting to convey said undivided one-tenth of said real estate to said Mary A. Neely; that said deeds and each of them were and are without any consideration whatever, and convey no interest or title from said defendant, Sarah F.

Russey, in and to said real estate ; that said widow, Mary A. Neely, after the probate of said will, elected to take her portion of the estate of her said husband under said will and not under the law.

The first paragraph of the answer of the defendant Cyrus G. Neely is a general denial. The second alleges the same general facts that are alleged in the second paragraph of answer of the defendant, Sarah F. Russey, and follows with the averments that on June 25th, 1884, Laura C. Friend and Lenora J. Bergenthal, two of the children of said testator, jointly with their husbands, executed a deed purporting to convey to the said Mary A. Neely the undivided two-tenths of said real estate, and, on July 1st, 1884, Sarah F. Russey, one of the children of said testator, who then was and now is the wife of James H. Russey, jointly with Cary O. Neely, Emma Neely, Kate Neely and Charles F. W. Neely, four of the other children of said testator, executed a deed purporting to convey to the said Mary A. Neely the undivided five-tenths of the real estate named in said complaint, and purporting to convey one-tenth hereof from each of the five persons so executing said conveyance, as one of the ten equal heirs of said testator ; that the said husband of Sarah F. Russey did not join with his said wife in the execution of said conveyance, nor did he execute the same, whereby the said deed as to the said Sarah F. Russey was and is wholly void and conveyed no real estate from her to the said Mary A. Neely ; that afterwards, on the 9th day of August, 1884, the said Charles F. W. Neely caused to be recorded upon page 60 of book 54 of the deed record of said county of Delaware, a pretended deed, bearing date of July 31st, 1884, purporting to have been executed by said Mary A. Neely to convey to the said Charles F. W. Neely the undivided seven-tenths of said real estate named in the complaint, together with her life-estate therein ; that no more than six-tenths of said real estate had ever been conveyed to the said Mary A.

Neely et al. v. Boyce et al.

Neely before that time and in addition to the estate devised to her by the will aforesaid, whatever that may be; the said Mary A. Neely, if she executed said last named deed at the date of its execution, owned only six-tenths of said real estate, if she owned any; that on the 9th day of January, 1885, the said Charles F. W. Neely executed to the said Cyrus G. Neely, this defendant, without the knowledge of said Cyrus, a deed conveying to him, this defendant, the undivided seven-tenths of the real estate named in the complaint, and without the knowledge of this defendant; and on the 17th day of February, 1885, caused said deed to be recorded on page 532 of book 54 of deed records of said county of Delaware; that after said deed had been so recorded, upon learning of the execution and record of the deed last named, without any consideration whatever, and for the sole purpose of reconveying to said Charles F. W. Neely whatever interest and the same title and interest in said real estate conveyed by said Charles F. W. to him by said deed, this defendant executed and delivered to the said Charles F. W. a deed purporting to convey to said Charles F. W. seven undivided tenths parts of the said real estate; that this defendant, at the time he executed said deed, knew nothing as to the execution of said deed by said Sarah F. Russey, and knew nothing as to the validity or invalidity of said deed, but executed his deed to Charles F. W. relying upon the statement of Charles F. W. that he had conveyed seven-tenths to this defendant, and for the purpose of reconveying what had been so conveyed to him to the said Charles F. W. he executed said deed, and thereafter the said Charles F. W., after having executed the mortgage set out in the complaint, conveyed said real estate to said Mary A. Neely; that all of said deeds were executed without any consideration whatever; that this defendant has never conveyed to the said Charles F. W., nor to any other person, the interest, title or estate devised to him in and by the will aforesaid, but is still the owner thereof in the same

Neely et al. v. Boyce et al.

manner and to the same extent as in said will provided, and the one-tenth so devised to him in and by said will is not liable under said mortgage nor encumbered thereby.

The defendants Laura C. Friend, Lenora J. Bergenthal, Sarah F. Russey, Cary O. Neely, Emma Neely, Cyrus G. Neely, Mary A. Neely, and Kate W. Neely, filed a joint answer in two paragraphs, the first being a general denial, and the second alleges substantially the same facts that are alleged in the second paragraph of the separate answer of said Cyrus G. Neely.

The plaintiff filed a separate demurrer to the second paragraph of each of said several answers for want of facts, which demurrer was overruled and exceptions reserved.

The plaintiff Boyce filed a reply to the second paragraph of the answers of the several defendants, in which he admits that on the — day of January, 1868, one Moses L. Neely died, at Delaware county, Indiana, the owner in fee, and in possession, of all the real estate described in the complaint, leaving the defendant, Mary A. Neely, his widow, and ten children him surviving, of whom defendants are seven, his only heirs at law; that said Moses L. Neely died testate, and left his last will and testament, which was duly probated January 18th, 1868, a copy of which will is set forth in defendant's joint answer, but avers that under the terms and provisions of said will said widow received a life estate in said real estate, and said children a vested interest in fee therein, subject only to said life estate; that on the 25th day of June, 1884, said Laura C. Friend and Lenora Bergenthal, together with their husbands, by warranty deed, conveyed to defendant Mary A. Neely the undivided two-tenths part of said land for a consideration of one dollar, as expressed in said deed; that said deed was duly recorded in the recorder's office of said county, in book 54, p. 56, on the 9th day of August, 1884; that on the 11th day of July, 1884, the defendants Charles F. W. Neely, Sarah F. Russey, Cary O. Neely, Emma Neely, and Kate W. Neely,

Neely et al. v. Boyce et al.

executed a deed to said Mary A. Neely, conveying to her the undivided five-tenths of said real estate, by deed of general warranty, for a consideration of one dollar each, including said Sarah F. Russey, said Sarah F. Russey being described in said deed as unmarried; that said deed was duly recorded in book 54, page 56, of deed records of said county; that afterwards, on the 31st day of July, 1884, said Mary A. Neely, by her warranty deed, conveyed to defendant, Charles F. W. Neely the undivided seven-tenths of said real estate in consideration of ———, as expressed in said deed, and that said deed of conveyance was duly recorded on the 9th day of August, 1884, in deed record 54, at page —; that afterwards, on the 9th day of January, 1885, said Charles F. W. Neely, by his warranty deed, for and in consideration of the sum of \$7,500, as expressed in the deed, conveyed to defendant, Cyrus G. Neely, the undivided seven-tenths of said real estate; said deed was duly recorded on the 18th day of February, 1885, in book 59, at page 28, of deed records of said county; that on the 17th day of February, 1885, said defendant, Cyrus G. Neely, by warranty deed, reconveyed said undivided seven-tenths of said real estate to said Charles F. W. Neely for a consideration, expressed in said deed, of \$7,500, and said deed was duly recorded on the — day of —, 1885, in book —, page —, of deed records of said county; that while said Charles F. W. Neely held said undivided seven-tenths of said real estate, and after each and all conveyances made by deeds containing covenants of general warranty warranting the title thereto had been placed of record, he executed the mortgage sought to be foreclosed in plaintiff's complaint; that plaintiff loaned to said defendant money to the amount of \$2,500, the amount of the note described in plaintiff's complaint as having been executed to plaintiff, the same being the consideration, and the only consideration, for said loan, said loan being made on the strength of the security described in said mortgage and the title

Neely et al. v. Boyce et al.

thereto as shown of record; that plaintiff purchased the other two notes on the strength of said security and title, believing that the same was valid and binding, as shown of record; that he had no knowledge whatever of any understanding or misunderstanding or agreements between defendants privately, but had only such knowledge of such conveyances as appears of record, and as is herein set forth; that he invested his money in good faith on his part. It is further averred that afterwards, on the 29th day of April, 1887, said Charles F. W. Neely, while said mortgage was on record, conveyed said real estate to said Mary A. Neely, that is to say, he conveyed said seven-tenths by warranty deed, except as to said mortgage; that in said deed of conveyance there was a special agreement between said Charles F. W. and Mary A. Neely that she assumed the payment of said mortgage, said stipulation being a part of the consideration therefor; that said Mary A. Neely has not lived upon said farm for more than eight years last past; that each and all of the children mentioned in said will are more than twenty-one years old, and none of them are supported by said Mary A. Neely.

Plaintiff also filed a second paragraph of answer in general denial.

The defendants demurred to the first paragraph of the reply for want of facts, which demurrer was overruled and exceptions reserved. Plaintiff filed a supplemental complaint, after the note for the two thousand dollars became due, asking judgment for the two thousand dollars and interest.

There was a trial and finding, and judgment for the plaintiff against all of the defendants, except Sarah F. Russey; the finding was only for the amount paid by the appellee as indorser, with six per cent. interest, and not for the eight per cent. interest and attorney's fees on said notes, as stated in the notes.

Cyrus G. Neely and Mary A. Neely filed a separate motion for a new trial. The other defendants against whom

Neely et al. v. Boyce et al.

judgment was rendered filed a joint motion for a new trial, which was overruled and exceptions taken. The defendant Sarah F. Russey having judgment in her favor, we do not deem it necessary to consider any question in relation to her rights in the matter.

The complaint, it will be noticed, charges nothing against any of the appellants. It is a complaint against Charles F. W. Neely and his wife, and Mary A. Neely, for personal judgment against Charles, and for foreclosure of the mortgage against all of the defendants named in the complaint. The appellants, on their own motion, were made parties to defend against the action. They do not ask that any averments be made against them in the complaint, and none are made.

The answers are pleaded as a defence to the complaint against the foreclosure of the mortgage. There is no affirmative relief asked. The answers set out the conveyances made by the defendants, and, if good, must be so on the theory that the fee to the real estate did not vest in the children under and by virtue of the will.

By the terms of the will the widow was given a life-estate in the land, and at her death it was devised to his children, share and share alike; the child or children of such as are dead to take the share of their parent. It specially enjoins upon the wife that she should keep the home farm, and farm it the same as the testator would do if still living. It grants to the executors the right to sell any portion of the estate which may be necessary to pay debts, costs of administration and any sum to be paid by the will, without order of court. The will, as we construe it, vested in the widow a life-estate and the fee in the children, subject to being divested only in case a sale became necessary to pay debts, costs of administration, or any sum provided by the will to be paid. *Jenkins v. Compton*, 123 Ind. 117; *Levengood v. Hoople*, 124 Ind. 27; *Koons v. Mellett*, 121 Ind. 585.

The children were all of age, and seven of them conveyed

Neely et al. v. Boyce et al.

their interest in the real estate, by warranty deed, to the widow, and she conveyed the seven-tenths to her son Charles F. W., by warranty deed, who conveyed the same to Cyrus G. Neely for a consideration, as stipulated in the deed, of \$7,500, and he reconveyed the same back by warranty deed, naming the same consideration. Then Charles F. W. Neely executed the mortgage in suit, and after the execution of the mortgage he reconveyed the seven-tenths of the real estate to his mother, the widow, and as a part of the consideration she assumed and agreed to pay the mortgage debt. There is no averment of knowledge on the part of the mortgagee as to any fraud or invalidity in the deeds. The answers do not plead any valid defence to the foreclosure of the mortgage, and even if they did, the reply alleges the conveyances to have been by warranty deeds, in which all the defendants, who are appellants, join, and they are estopped from setting up any title to the land against their grantees and those claiming under them.

It is well settled that any subsequently acquired title by a grantor in a warranty deed to the premises conveyed inures to the benefit of the grantee. If the grantors in the several deeds had title at the time of the conveyance it passed by the deeds, or if they acquired any afterwards and before suit, it inured to the benefit of their grantees, and if they have not had any title at all to the real estate, then they have no interest in the result of the suit whereby they can prevent a foreclosure of the mortgage.

In any event, there is no error in the rulings upon the pleadings of which they can complain. Nor is there any error in the amount of the recovery, of which appellants can complain. They having no interest in the real estate, it is immaterial to them for what amount judgment was rendered. The complaint alleges the facts, and we see no reason why the appellee was not entitled to judgment for the amount he paid as indorser, with interest, even if he had no right of recovery upon the note. He was indorser on the note, and

Vaughan v. The State.

the payor being insolvent, he had the right to pay it, and recover the amount paid, with interest, at least. We see no reason why the fact that he had the payee indorse the note to him should deprive him of the right to recover the amount actually paid, with interest.

What we have said disposes of the case upon the evidence, as the disposition of the case upon the evidence depends upon the construction placed upon the will, and effect to be given to the deeds.

There is no error in the record.

Judgment affirmed, with costs.

Filed April 4, 1891.

No. 15,486.

VAUGHAN v. THE STATE.

CRIMINAL LAW.—*Assault and Battery with Intent to Kill.—Information.*—

An information charging that one A., at, etc., on, etc., "did then and there unlawfully, feloniously, wilfully, and purposely, and with premeditated malice, in a rude, insolent, and angry manner, touch one B., with intent then and there, and thereby, her, the said B., feloniously, wilfully, and purposely, and with premeditated malice, to kill and murder," etc., contains a good charge of assault and battery, with intent to commit the crime of murder.

From the Montgomery Circuit Court.

C. Johnston and W. H. Johnston, for appellant.

A. G. Smith, Attorney General, for the State.

COFFEY, J.—This was a prosecution by the State, in the Montgomery Circuit Court, by affidavit and information, against the appellant upon a charge of assault and battery with the intent to commit a felony. The jury returned a verdict finding the appellant guilty, as charged, whereupon a motion in arrest of judgment was interposed. The motion was overruled by the court, and a judgment was rendered on the verdict of the jury. The assignment of error calls in question

Vaughan v. The State.

the correctness of the ruling of the circuit court in overruling the motion of the appellant to arrest the judgment.

The motion was based upon the claim of the appellant that the information in the cause does not charge a public offence. The information, omitting the formal parts, is as follows: "Albert B. Anderson, the prosecuting attorney for the county of Montgomery, gives the court to understand and be informed that at and in the county of Montgomery and State of Indiana, on the 10th day of December, 1889, one John J. Vaughan did then and there unlawfully, feloniously, wilfully, and purposely, and with premeditated malice, in a rude, insolent, and angry manner, touch one Mary M. Vaughan, with intent then and there, and thereby, her, the said Mary M. Vaughan, feloniously, wilfully, purposely, and with premeditated malice, to kill and murder," etc.

The contention of the appellant is, that the information is fatally defective, in that it fails to charge that he possessed the present ability to commit the injury he is charged with intending to commit.

We do not think such a charge was necessary. The appellant is in error in assuming that he is charged with a mere assault with intent to commit a felony.

If such were the charge against him, then it would be necessary to allege the present ability to commit the injury, as such language is necessary to describe an assault. But the appellant is charged with an assault and battery, with the intent to commit a felony. The assault and battery is well charged, and no allegation to the effect that he possessed the present ability to commit the injury is necessary to a charge of that kind.

This information, in our opinion, contains a good charge of assault and battery, with intent to commit the crime of murder. *Knight v. State*, 84 Ind. 73; *Hays v. State*, 77 Ind. 450; *Keeling v. State*, 107 Ind. 563.

Judgment affirmed.

Filed April 8, 1891.

Johnston et al. v. The State, ex rel. Sefton.

No. 16,001.

JOHNSTON ET AL. v. THE STATE, EX REL. SEFTON.

CONSTITUTIONAL LAW.—*Tie Vote.*—*Constitutionality of Section 4736, R. S. 1881.*—Section 4736, R. S. 1881, which provides that where an election results in a tie vote for opposing candidates, the judges of election shall determine by lot the person entitled to the office, is not in conflict with the constitutional provision that all elections shall be by ballot (Const., Art. 2, section 13), and is valid.

SAME.—*Mandamus.*—Where the judges of election, after certifying the result as a tie vote, adjourn without determining by lot the person entitled to the office, they may be compelled by mandate to re-assemble and take the action required by law.

SAME.—*Relator.*—*Estoppel.*—The relator is not estopped to successfully urge his claim to the office by requesting the election officers not to determine the result of the election.

From the Decatur Circuit Court.

S. A. Bonner, M. D. Tackett, B. F. Bennett, D. A. Myers,
and *W. Woodfill*, for appellants.

J. K. Ewing, C. Ewing, J. D. Miller and F. E. Gavin, for
appellee.

ELLIOTT, J.—The relator, Oliver C. Sefton, William A. Williams, and James Parker, were candidates for the office of township trustee. Alexander C. Johnston was the inspector, and Samuel T. Meek and John Foley were the judges of the election. At the close of the election the votes cast were counted and canvassed by the election board, and it was found that the relator had received eighty-nine votes, Williams eighty-nine votes, and Parker two votes. The election officers certified that the relator and Williams had received the highest number of votes cast at the election; they refused, however, to determine by lot which of the two candidates was entitled to the office, and, although requested in writing, refused to re-assemble and determine which of the two candidates, who received the highest number of votes, should be declared entitled to the office of township

128	16
128	359
129	590
128	16
132	599
128	16
147	634

Johnston *et al.* v. The State, *ex rel.* Sefton.

trustee. Our statute provides that "If two or more have the highest and an equal number of votes for the same office, such judges shall, when the result is certified, determine by lot the person entitled to the office; and the next day, the inspectors shall make out and deliver to the person elected, when demanded, a certificate for each person elected to any office in said township, except justices of the peace." Section 4736, R. S. 1881.

Assuming that the statutory provision quoted is valid, the remedy adopted by the relator (*mandamus*) is appropriate. The duties of election officers, when prescribed by statute, as in this instance, are imperative, and performance may be coerced by the writ of *mandamus*. Nor can the election officers evade their duties by adjourning without taking the action required by law. In discussing this question the Supreme Court of Michigan said, in the case of *Attorney General v. Board, etc.*, 64 Mich. 607, in speaking of the members of the election board, that "Until they have done so, they have no right to dissolve their meeting. They can only get out of their office by completing its work. It would be worse than absurd to allow a board of canvassers to defeat the popular will, and destroy an election, by refusing or neglecting to do what the law requires them to do." The cases are harmonious upon the proposition we have asserted. *Brower v. O'Brien*, 2 Ind. 423; *Kisler v. Cameron*, 39 Ind. 488; *Moore v. Kessler*, 59 Ind. 152; *State, ex rel., v. Gibbs*, 13 Fla. 55 (7 Am. R. 233); *Hagerty v. Arnold*, 13 Kansas, 367; *Lewis v. Commissioners, etc.*, 16 Kansas, 102 (22 Am. R. 275); *People, ex rel., v. Schiellein*, 95 N. Y. 124; *State, ex rel., v. Stearns*, 11 Neb. 104; *State, ex rel., v. Peacock*, 15 Neb. 442; *People, ex rel., v. Nordheim*, 99 Ill. 553.

The question upon which the case hinges is whether the statutory provision quoted is valid. The appellants' counsel ingeniously and plausibly argue that the provision is invalid for the reason that it is in conflict with the constitu-

Johnston et al. v. The State, ex rel. Sefton.

tional provision that all elections shall be by ballot. Const., article 2, section 13.

We can not concur with counsel, that where an election is held and results in a tie vote for opposing candidates, the General Assembly may not provide for determining the right to the office otherwise than by making provision for another election.

Constitutions are framed by existing and organized society, and are to be construed with reference to well-known practices and usages. *State, ex rel., v. Noble*, 118 Ind. 350 (361); *Durham v. State, ex rel.*, 117 Ind. 477; Cooley's Const. Lim. (5th ed.) 73. We know that the practice of determining a tie vote by lot prevailed before our Constitution was adopted, and it is our duty to presume that the framers of that instrument were not ignorant or unmindful of this ancient usage. It is, therefore, no more than reasonable to hold that a statute providing for an election by ballot is valid, although it also provides for determining a tie vote by lot, for the framers of the Constitution may well be deemed to have had this usage in view, and to have intended that it should be resorted to in cases where an election should result in a tie between opposing candidates. Such a statute as the one before us does give the electors an opportunity to vote by ballot, and affixes to each vote all the force it is possible to assign it. In no respect is the elector's right abridged or limited; all that is done is to provide that in cases where the electors fail to make a choice, the choice may be determined by lot between the candidates who have received the highest number of votes. This course gives to all the votes cast full weight and force, and prevents the nullification of the election where a tie vote results. Unless there is power in the General Assembly to provide for the determination of a tie vote, an incumbent of an office might hold far beyond his term, since it is conceivable that many elections might result in a tie.

The authorities give full support to our assertion that the

Johnston *et al.* v. The State, *ex rel.* Sefton.

Legislature may provide that a tie vote shall be determined by lot. *Webster v. Gilmore*, 91 Ill. 324; *Keeler v. Robertson*, 27 Mich. 116; *People, ex rel., v. Sutherland*, 41 Mich. 177; *State v. McKinnon*, 8 Oregon, 485; *State, ex rel., v. Wilkinson*, 23 Neb. 710; *Hammock v. Barnes*, 4 Bush, 390.

We have found no judicial decision conflicting with the cases to which we have referred, nor have we been referred to any by appellants' counsel. The report of the Congressional committee, to which we are referred, can not be regarded as authority.

While we are satisfied that no statute can be upheld which assumes to destroy the right of the inhabitants of a township to elect their own trustee, yet we are also satisfied that where a full opportunity is given them to make a choice, and they equally divide their votes, it is within the power of the General Assembly to make provision for determining the result of the election. Our Constitution provides that "Such other county and township officers as may be necessary shall be elected or appointed in such manner as may be prescribed by law." Article 6, section 3. It seems clear to us that, taking this provision in connection with the general one respecting elections, and combining them, in accordance with the principles to which we have referred, the General Assembly did not transcend its power in enacting the statute under consideration.

Counsel's argument, that the policy of determining the right to an office by lot is an evil one, might have weight with a legislative assembly, but it can have none with the courts. Questions of policy and expediency are legislative, and not judicial. *Beauchamp v. State*, 6 Blackf. 299; *Hedderich v. State*, 101 Ind. 564, and authorities cited.

The appellants' position, that the relator can not successfully urge his claim to the office for the reason that he created an estoppel against himself by requesting the election officers not to determine the result of the election, can not be defended. The duties of the election officers were pre-

Cummings et al. v. Martin.

scribed by a public law, and all the interested parties had equal knowledge, so that no estoppel could possibly arise. But more than this: the public had an interest in having the election officers perform the duty enjoined upon them by law, and it was not for the relator to relieve them from that duty; and this they were bound to know. *School District, v. Root*, 61 Mich. 373.

Judgment affirmed.

MILLER, J., did not take part in the decision of this case.
Filed April 8, 1891.

128	20
131	271
131	541

128	20
134	481

128	20
150	588

128	20
159	166

128	20
162	685

128	20
163	579

128	20
164	393
164	403

No. 14,909.

CUMMINGS ET AL. v. MARTIN.

MARRIED WOMAN.—*Loan to.*—*Suretyship.*—Where a married woman personally applies for a loan, and the loan is made in good faith under the belief that the money is for her own use, and she executes a mortgage upon her separate property as security, her husband joining, such married woman is liable as principal, and the fact that there is a secret understanding between the husband and the wife that the money is being borrowed for the husband's use, and is handed to him by the wife as soon as received, is immaterial.

From the Hamilton Circuit Court.

T. J. Kane and T. P. Davis, for appellants.

W. Neal and R. P. Neal, for appellee.

MCBRIDE, J.—This was a suit by the appellee to foreclose a mortgage given by appellants, Louisa Cummings and Hugh A. Cummings, her husband, to the appellee. The defence was, that the debt which the mortgage was given to secure was the debt of the husband; that the mortgaged property was the separate property of the wife, and that she executed the mortgage as his surety only.

Appellants assign as error the overruling of a demurrer to the complaint. In their brief they content themselves with merely calling attention to the error thus assigned, but do not point out, or attempt to point out, any defect in the complaint. The only other error assigned is in overruling appellants' motion for a new trial. This calls in question the sufficiency of the evidence to sustain the finding of the court.

There is some conflict in the evidence. It is clear, however, that the money was borrowed by the wife. The evidence also shows that, as between the husband and wife, it was understood the money was being borrowed by her for him, and because he had been unable to borrow it. He had applied to several to loan him the money, without success; but he had not applied to the appellee.

There is evidence tending to show that the appellee had no knowledge of the understanding between the husband and wife. The appellant testified that, as soon as the money was handed to her, she handed it to her husband. In this she was corroborated by the husband and their son. Appellee testified that she had no knowledge of this, or that the money was borrowed for the husband.

The officer who took the acknowledgment of the mortgage testified that he saw the money paid by the appellee to the appellant, but did not see her hand it to the husband.

He also testified that the appellant said to him that she was borrowing the money, but expected to let her husband have a part of it, and consulted him about taking a chattel mortgage on the husband's furniture to secure her in doing so. Of this fact the appellee seems to have had no knowledge.

In this State the only restrictions upon the power of a married woman to contract are, that she can not make a valid executory contract to sell or mortgage her real estate, or convey or mortgage the same, except by deed or mortgage in which the husband joins, and she can not enter into any con-

Cummings *et al.* v. Martin.

tracts of suretyship; otherwise she can contract as freely as if she were unmarried, and her contracts are as binding upon her. It can not be doubted that one of the principal reasons for the enactment of the statute forbidding married women to enter into any contracts of suretyship, and making such contracts void as to them, was to prevent them from squandering or encumbering their property as sureties for improvident husbands. The courts have rightfully shown a disposition to scan closely contracts where there was reason to suspect that the transaction, while in form a contract, with the wife as principal, was, in fact, an attempted evasion of the statute, the consideration moving solely to the husband. Where this has been found to be true, it has uniformly been held that the contract is within the inhibition of the statute, and is void as to the wife. *Dodge v. Kinzy*, 101 Ind. 102; *Vogel v. Leichner*, 102 Ind. 55; *Cupp v. Campbell*, 103 Ind. 213; *Brown v. Will*, 103 Ind. 71; *Allen v. Davis*, 99 Ind. 216; *Allen v. Davis*, 101 Ind. 187; *Orr v. White*, 106 Ind. 341; *Ward v. Berkshire Life Ins. Co.*, 108 Ind. 301; *Rogers v. Union Cent. Life Ins. Co.*, 111 Ind. 343; *Long v. Crosson*, 119 Ind. 3; *Security Co. v. Arbuckle*, 119 Ind. 69; *Nixon v. Whitely, etc., Co.*, 120 Ind. 360; *Stewart v. Babbs*, 120 Ind. 568; *Engler v. Acker*, 106 Ind. 223; *Crooks v. Kennett*, 111 Ind. 347; *Miller v. Shields*, 124 Ind. 166; *Warey v. Forst*, 102 Ind. 205.

While this is true, it is, however, not enough that, as between the husband and wife, it was understood that she was only *pro forma* the borrower, and that the husband was to receive the money. It would open the door to the perpetration of great frauds if mortgages were to be declared void simply because, as between the husband and wife, it was understood that the money was being borrowed for the husband's use, and was, in fact, at once handed to and used by him for his sole benefit. *Rogers v. Union Cent. Life Ins. Co.*, *supra*; *Bouvey v. McNeal*, 126 Ind. 541; *Ward v.*

Berkshire Life Ins. Co., 108 Ind. 301. In the latter case it is said :

“ It is not material that there was a secret agreement between the husband and wife, for the appellee could not be prejudiced by an agreement of which it had no notice. The question is, not what facts were known to the mortgagors, but what facts did the appellee have knowledge of, or ought under the circumstances to be charged with having knowledge of? It is true that the appellee, having notice of Mrs. Ward's coverture, was bound to inquire whether she had capacity to make the contract ; but when reasonable care and diligence are exercised, the party contracting with a married woman may rely upon her representations.”

The inquiry above referred to is whether she is contracting, or proposing to contract, as principal or as surety.

It is only where the lender is a party to, or is chargeable with knowledge of, the attempted evasion of the statute that the contract is invalidated. If he in good faith loans the money to the wife, he can not be affected by any secret understanding between her and her husband. The circumstances may be such that, as between husband and wife, he is the principal debtor, and she only his surety ; but if she has personally applied for the loan, and represented to the lender that it was for herself, and he, relying upon such representation has, in good faith, made the loan, she is, as to such lender, not a surety, but the principal debtor.

Language used in *Vogel v. Leichner*, *supra*, and some other cases following it, may seem to assert the proposition that in all cases where one has loaned money to a married woman, the burden of proof is on the lender to show that she received, or was to receive, the benefit of the loan ; or that in the transaction she was not surety. A comparison of these cases with the later cases will show that this is the rule only where there is something about the transaction to indicate that the debt is apparently, or may be, the debt of another, and not her debt. This is not the rule where the transaction shows upon

Cummings et al. v. Martin.

its face that it is her separate contract. See, especially, *Miller v. Shields, supra*; also, *Long v. Crosson, supra*; *Security Co. v. Arbuckle, supra*.

In such a case, if she attempts to escape liability on the ground that she is only surety, she must plead and prove such fact, and the burden is upon her to do so. Nor will it be enough for her to show that, as between her and her husband, she is only surety; but she must show that the creditor either contracted with her as surety, or that the circumstances were such as to charge him with knowledge of such fact. Unless there is something to put the lender upon inquiry, or suggest to him that the husband is the real borrower, he may as safely lend money to a married woman as to her husband. The same statute, by one section of which her contracts of suretyship are declared void, by another section provides that "she shall be bound by an estoppel *in pais*, like any other person." See the last clause of section 5117, R. S. 1881. Having by her representations secured the loan, she will be estopped to say that the representations were untrue, and that she was, after all, only surety.

The fact that the appellant, as soon as she received the money, handed it to her husband, can not affect the question. The witnesses all agree that after the note and mortgage were executed the appellee handed the money to the wife. The transaction was then complete, and when the money reached the hands of the borrower she had the right to do with it as she wished. Appellee had then neither the power nor the right to interfere in any manner. She could not compel her to hand back the money, nor could she dictate how it should be disposed of. The same statute which limits the power of a married woman to convey or mortgage her real estate gives her unrestricted power over her personal estate. Section 5117, *supra*.

Having borrowed money, she may give it to her husband, or to any other person. Her dominion over her personal

The Michigan Mutual Life Insurance Company v. Custer.

estate is as absolute as is the dominion of the husband over his.

We find no error in the record, and the judgment is affirmed.

Filed April 7, 1891.

No. 14,785.

THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY v.
CUSTER.

LIFE INSURANCE.—Premium Overdue and Unpaid.—Validity of Provision Against Liability.—A provision in a policy of insurance that the insurer shall not be liable for a loss occurring while a note given for premium is overdue and unpaid, is valid, and exonerates the insurer from liability while such delinquency continues.

SAME.—Waiver of Forfeiture Incurred by Non-Payment of Premium.—A provision in a policy of insurance providing for the forfeiture of the policy for non-payment of the premium is for the benefit of the insurer, and may be waived by it.

SAME.—Premium Note Overdue.—Extension of Time of Payment.—Loss During Extension.—A clause in a policy of life insurance provided that if any premium should be settled by note, such settlement should not be deemed a payment, but only an extension of the time for the payment of that premium; and if the note, or any renewal of it, should not be fully paid when due, then, for any loss occurring while such note remained due and unpaid, the insurer should not be liable, but the whole amount of the premium included in such note should be considered as earned, and the insurer might collect it. The insured failed to pay a premium when due, and gave his note therefor, due in seven months, and before this note was due, the time of payment was extended by mutual agreement five months, during which five months he died.

Held, that there was a sufficient consideration to support the agreement to extend the time of payment the extra five months, that it was not a mere indulgence to the maker; and that the insurer was liable for the loss occurring under such policy.

SAME.—Proof of Extension of Note.—Tile Season.—Where it is alleged that the note was extended until the season for the sale of tile for a desig-

128 25
131 72

The Michigan Mutual Life Insurance Company v. Custer.

nated year had expired, evidence of the period constituting the tile season is admissible to show such extension.

From the Tippecanoe Circuit Court.

W. S. Hartman, W. H. Hamelle and J. H. Adams, for appellant.

P.-S. Kennedy, W. D. Wallace and T. H. Ristine, for appellee.

MILLER, J.—This action was instituted in the court below by the appellee, Eliza A. Custer, against the appellant, the Michigan Mutual Life Insurance Company. The foundation of the action was a life policy issued by the appellant upon the life of Montgomery T. Custer, the husband of the appellee.

In the third paragraph of complaint it is averred, in substance, that Eliza A. Custer is the widow of Montgomery T. Custer, late of Montgomery county, Indiana; that appellant, the Michigan Mutual Life Insurance Company, is a foreign corporation, with its principal office at Detroit, Michigan; that June 2d, 1883, in consideration of the payment of \$57, by Montgomery T. Custer, the appellant executed a policy of insurance, promising thereby to pay to him at the expiration of thirty-five years, the sum of \$2,000, or in the event of his earlier death to pay such sum to his widow; that Montgomery T. Custer died at New Ross, Montgomery county, Indiana, May 9th, 1885, and on June 3d, following, appellee furnished appellant with proofs of death; that appellee and said Montgomery T. Custer performed all the stipulations imposed on them by such contract of insurance, except that Montgomery T. Custer did not pay the annual cash premium on said policy of insurance due June 2d, 1884; that in lieu of the payment of such premium in cash, Montgomery T. Custer executed, and the appellant insurance company accepted, on said day, a note bearing date June 2d, 1884, for \$57, due seven months after date, bearing seven

The Michigan Mutual Life Insurance Company v. Custer.

per cent. interest, and payable to the appellant at Darlington, Indiana.

In this paragraph it is averred that about three weeks prior to the maturity of the premium note in question the appellant insurance company, at the request of Montgomery T. Custer, consented and agreed that the time for the payment of the note should be, and it then was, extended to the 2d day of June, 1885; that thereupon the note was, by appellant's agents, returned to appellant's home office at Detroit, where it remained without demand of payment until after Montgomery T. Custer's death, and that Montgomery T. Custer relied on such agreement and extension of time until the time of his death.

The policy of insurance sued on and made part of the complaint, by proper exhibit, contains the following stipulation:

"3d. If the first or any subsequent premium on this policy shall be settled wholly, or in part, by note or other obligation, whether of the beneficiary, the insured, or any third party, such settlement shall not be deemed a payment but only an extension of the time for the payment of such premium; and if such note or other obligation, or any renewal thereof, shall not be fully paid when due, then, for any loss occurring while such note or other obligation remains due and unpaid, the company shall not be liable, but the whole amount of the premium included in such note or other obligation shall be considered as earned, and the company may collect the same."

A separate demurrer by the appellant was filed to the second and third paragraphs of complaint, challenging the sufficiency of the facts stated in each paragraph to constitute a cause of action.

These demurrers were severally overruled, and the appellant excepted to the ruling of the court.

An answer was filed in general denial, and two affirma-

The Michigan Mutual Life Insurance Company v. Custer.

tive paragraphs. It is not important to note here the contents of the special paragraphs of answer.

A demurrer to the second paragraph of answer was sustained, and appellant excepted.

The cause was tried by a jury, and a special verdict returned, upon which verdict judgment was entered in favor of the appellee.

The errors assigned call in question the rulings of the court on the demurrers, and in overruling the motions of the appellant to require the jury to retire for further deliberation, and to return facts indisputably proved at the trial; for a *venire de novo*, for judgment for the appellant on the special verdict, and for a new trial.

No proof was introduced upon the trial to establish the second paragraph of complaint; and the finding of the jury was adverse to the plaintiff on the matters therein set forth.

The second paragraph of answer, while addressed to the whole complaint, refers only to matters contained in the second paragraph; and, therefore, the defendant was not harmed by the overruling of the demurrer to the second paragraph of complaint, and sustaining the demurrer to the second paragraph of answer.

The cause was tried on the third paragraph of complaint, and the answer of general denial.

The first question presented for our consideration relates to the sufficiency of the third paragraph of complaint as a cause of action.

The objections pointed out to this paragraph are twofold:

1. That the agreement to extend the time for the payment of the premium note, after its maturity, was without consideration, and was a mere indulgence to the maker. 2. That the extension of time was not inconsistent with a suspension of the company's liability during the time the note remained overdue.

The appellee does not contend that the agreement for an extension was a valid, binding contract, but that it consti-

The Michigan Mutual Life Insurance Company v. Custer.

tutes a waiver by the company of the payment of the note at its maturity.

That a provision in a policy of insurance that the company shall not be liable for a loss occurring while a note given for premium is overdue and unpaid, is valid in law, and exonerates the insurer from liability while such delinquency continues, is well established. It is equally well settled that the provision in a policy of insurance providing for the forfeiture of the same for non-payment of the premium is for the benefit of the insurer, and may be waived by it. *Home Ins. Co. v. Gilman*, 112 Ind. 7; *Sweetser v. Odd Fellows, etc., Ass'n*, 117 Ind. 97; *May Insurance*, section 360; *Bliss Life Ins.*, section 154.

The position assumed by this court upon this subject is stated in *Sweetser v. Odd Fellows, etc., Ass'n, supra*, in these words:

"It is abundantly settled that an insurance company will be estopped to insist upon a forfeiture, if, by any agreement, either express or implied by the course of its conduct, it leads the insured honestly to believe that the premiums, or assessments will be received after the appointed day. The decisions which hold and enforce this view are very numerous." And again:

"Forfeitures are not favored in the law; and courts, in order to avoid the odious results of a forfeiture, are not slow in seizing hold of such circumstances as may have been acted on in good faith, and which indicate an agreement on the part of the company, or an election, to waive strict compliance with the conditions and stipulations in the policy."

Applying these principles to the allegations contained in the complaint inevitably leads to the conclusion that the pleading is not defective on account of the first objection urged to the same. It is difficult to imagine a state of facts more likely to lead the insured to believe that the premium would be received after the time at which it was made payable, and that the company had elected to waive strict com-

The Michigan Mutual Life Insurance Company v. Curtis.

pliance with the terms of the policy, than the agreement set out in the complaint for an extension of time for payment.

We are not satisfied that the agreement for an extension, was without consideration. The contract of insurance entered into between the insured and the insurer was valuable to both of the contracting parties. The insured desired to avail himself of the benefits to accrue by a continuance of the same in the future. The company held his interest-bearing note; his obligation to pay the future annual premiums depended upon the continuance of the policy in force. Under these circumstances we are of the opinion that the agreement made before default to extend the time for the payment of the note, and thus keep alive the policy, was founded upon a sufficient consideration. In this we are fortified by the opinion of the court in *Homer v. Guardian, etc., Ins. Co.*, 67 N. Y. 478 (483); *Wyman v. Phoenix, etc., Ins. Co.*, 119 N. Y. 274 (280).

The second objection to the paragraph under consideration is predicated, mainly, upon the assumption that the extension of time averred in the complaint was without consideration. If there was a good and sufficient consideration for the extension of time, then the premium note was not, during the period covered by the extension, overdue, and the policy was continued in force until the termination of such extended period.

If, on the other hand, the extension was, as claimed by the appellant, a simple gratuity, it was none the less a waiver of the payment of the note at its maturity, and as the forfeiture was in the nature of a penalty, and intended to secure the prompt payment of the note, the waiver of payment was a waiver of the right to enforce the penalty for non-payment. According to the interpretation claimed by the appellant, the arrangement to extend the time for the payment of the note, so far as his rights under the policy were concerned, would have left him precisely in the condition he would have been without an extension. It would enable the company, under

The Michigan Mutual Life Insurance Company v. Custer.

a show of leniency, to receive all the benefits of the extension, and yet remain in a condition to repudiate all liability during the same time. It would enable the company, whatever happened, to "reap the premium and escape the risk." *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96.

The case of *Homer v. Guardian, etc., Ins. Co.*, *supra*, was much like this one. The policy contained a stipulation that "in case the premium or premiums shall not be paid to said company on or before the time specified for the payment of the same," the policy should be forfeited. Prior to the time of the maturity of a premium, the time for its payment was extended, and during such extension the insured died. It was claimed by the company in that case, as in this, that the contract for extension was void for want of consideration, and that the policy had become forfeited on account of non-payment of the premium. The court held that the company, having consented to an extension, was estopped to insist upon a forfeiture, or to allege that the policy was not continued in full force and effect; that the effect of giving the extension was to continue the policy and the contract of insurance in full force as if there had been strict performance of the condition at the day; and liable only to a forfeiture by non-payment at the time to which performance was deferred.

In the course of the opinion the court says: "It can not be intended from the simple transaction of giving time for payment of the premium—that is, giving credit instead of exacting prompt payment—the parties had in view the continuance of the contract merely to secure the benefit of it to the insurer by the payment of the premium if the peril insured against should not happen, but in case of the death of the insured before the time should elapse for its payment the contract should be void; that is, that upon the occurrence of the event constituting the peril, indemnity against which was the only object and purpose of the contract, the policy should be of no avail. This would be saying to one

The Michigan Mutual Life Insurance Company v. Custer.

undertaking to pay in the future for a risk to commence *in præsenti*, that his life is insured if he lives, but if he dies he is not insured."

The appellant cites the cases of *Wall v. Home Ins. Co.*, 36 N. Y. 157, and *Ferebee v. N. C. Mut., etc., Ins. Co.*, 68 N. C. 11. The case of *Wall v. Home Ins. Co.*, *supra*, is substantially overruled by the later cases in that State, and is expressly disapproved in the well-considered case of *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84. See, also, *Sweetser v. Odd Fellows, etc., Ass'n, supra*.

We are satisfied that the weight of authority is against the doctrine of these cases.

In our opinion the court did not err in overruling the demurrer to the third paragraph of complaint.

It is claimed that the court erred in overruling the appellant's motion for judgment in its favor on the special verdict.

The principal point made under this assignment is that the finding in reference to the extension of time for payment of the note does not correspond with the allegations of the complaint.

The allegation is, in substance, that the insured was to have until the 2d day of June, 1885, to pay the note. The finding is that he was to have until he could realize, during the next tile season, money from the sale of tile for the year 1885, with which to pay the note, and that the season for selling tile extended from about the 1st of March to the middle of June. It is also found that the insured died on the 9th day of May, 1885, and that the first demand for the payment of the note was on the 27th day of May, written and addressed to the insured after his death.

The variance, if such it was, between the allegations in the pleading and the proof was not material. Section 391, R. S. 1881. Looking to all parts of the verdict and construing it as a whole, we think it appears that the extension

The Michigan Mutual Life Insurance Company v. Custer.

included, at least, the 27th day of May, when the demand was made, which was after the death of the insured.

Some objection is made to the finding upon the subject of the proof made of the death of the assured. While the finding is not very full and explicit upon this point, we find, upon examination, that the finding is almost in the exact words of the policy, requiring proof. And upon looking into the evidence to see if the merits of the cause have been fairly tried and determined, we find that the company, at the trial of the cause, admitted that notice of the death was given to the company in due time and in due form.

We have read the evidence and find that there is evidence tending to sustain the verdict of the jury upon every material finding, and, under the well established rule of this court, we can not interfere with their verdict.

The court did not err in permitting the appellee to read in evidence the letter dated May 27, written by the company to the insured, and demanding payment of the note. Such evidence was competent to be considered by the jury as bearing upon the question of the alleged extension of the time for the payment of the note. Neither do we think the court erred in receiving testimony in reference to the duration of the tile season in Montgomery county. The arrangement made between Custer and the agents of the company was made with reference to this tile season. It was not necessary that the contract for extension should be to a precise date.

Judgment affirmed.

Filed April 7, 1891.

VOL. 128.—3

The Evansville and Richmond Railroad Company v. Swift.

No. 15,246.

**THE EVANSVILLE AND RICHMOND RAILROAD COMPANY
v. SWIFT.**

RAILROAD.—Appropriation of Land for Right of Way.—Measure of Damages.—Evidence.—In a proceeding by a railroad company to appropriate land for its right of way, it is proper to prove the value of the land without the road across it, and its value when divided by the road into parcels, and it is proper for the jury to consider such evidence in assessing the damages.

SAME.—Appropriation Proceedings.—Jurisdiction.—The principal object of proceedings to appropriate land for the right of way of a railroad is to appropriate and acquire a title to the land, and the assessment of damages is a mere incident to and arises out of the act of appropriation; and the Supreme Court has jurisdiction on appeal.

PRACTICE.—Objection to Evidence.—Where part of the answer of a witness is competent, though part is incompetent, it is not error to overrule a motion to strike out such answer.

From the Jackson Circuit Court.

M. F. Dunn and G. G. Dunn, for appellant.

W. K. Marshall, for appellee.

OLDS, C. J.—The appellant filed its instrument of appropriation with the clerk of the Jackson Circuit Court, and sought to condemn and appropriate, for its use, certain lands of the appellee. Appraisers were duly appointed to assess such damages as the appellee would sustain by reason of such appropriation. The appraisers made their award, and filed the same with the clerk of said court. The appellee, at the proper time, filed his exceptions, claiming the amount awarded to him was insufficient. The cause was tried by the court, without the intervention of a jury, who assessed the appellee's damages at \$640. The appraisers assessed his damages at \$200.

The appellant filed a motion for a new trial, which was overruled by the court, and exceptions reserved.

Judgment for appellee for \$640, from which this appeal is prosecuted.

128	34
141	318
128	34
149	179
128	34
163	291

The Evansville and Richmond Railroad Company v. Swift.

The alleged errors complained of and discussed relate to the rulings of the court on the introduction of evidence.

Charles Leminger, a witness for appellee, was asked to "state how much the Swift land was worth per acre before the road ran through it." The appellant, at the time, objected, for the reason "that it was not the proper way to prove the market value of the land, no proper basis having been laid, and as calling for a mere opinion." The court overruled the objection, and the appellant excepted.

The witness answered that "it was worth two hundred and fifty dollars per acre before the road was made, and now the little piece is worthless and the large piece is worth two hundred dollars per acre."

As we interpret the objection stated to the question, if it presents any objection which can be considered, it is that the question was not competent, for the reason that it is incompetent to prove the value of the land before the road ran through it, for the purpose of determining the amount of damage, and for the further reason that it called for a mere opinion of the witness. The statement that "no proper basis having been laid" can have no definite application, unless it is intended as an objection on account of the witness not having shown any qualification to speak as to its value, and we do not think it can be interpreted as an objection on that ground. If it can be so interpreted, it is not well taken, as the witness had shown some knowledge of the value of lands in the vicinity and an acquaintance with the particular land in question. The phase of the objection relating to its not being a proper method of proving damages has been settled by this court adversely to the theory of the appellant, as it has been held that it is proper to prove by competent witnesses the value of the land without the road across it, and the value with it divided by the road into parcels, and that it is proper for the jury to consider such evidence in assessing the damages. *Indianapolis,*

The Evansville and Richmond Railroad Company v. Swift.

etc., *R. R. Co. v. Pugh*, 85 Ind. 279; *Indiana, etc.*, *R. W. Co. v. Allen*, 100 Ind. 409.

The same question is presented as to the ruling of the court on objections to questions propounded to several witnesses. The witness, Mitchell, stated, in answer to a question, that "the little piece of land is worthless now," and added: "I will not give twenty-five dollars per acre for it; the large piece is worth \$200 per acre." The appellant moved to strike out the answer. Some part of the answer was competent, and it was not error to overrule the motion as made.

We have examined all the questions presented. They are similar to those already stated.

There is no error in the record for which the judgment should be reversed.

The appeal in this case presents a question of jurisdiction,—as to whether or not, under the Appellate Court Act, approved February 28, 1891, this court or the Appellate Court has jurisdiction on appeal of this class of cases.

The proceedings in this case were instituted for the purpose of condemning and appraising the lands of the appellee to the uses and purposes of the appellant, a railroad company, and the damages are assessable as a mere incident, and arise out of the act of taking the land by the company. Before the passage of the act referred to, by the Constitution and laws of the State the Supreme Court had exclusive jurisdiction in all cases in which an appeal would lie from the circuit court. The Appellate Court is a creature of the statute under the Constitution, and derives such jurisdiction only as is given to it by the act creating it. By that act jurisdiction is taken from this court in certain classes of cases and given to the Appellate Court. The act does not take or attempt to take from the Supreme Court, or to confer on the Appellate Court, jurisdiction in any cases relating to real estate, except in "actions between landlord and tenant for the recovery of the possession of the leased premises," and by this provision of the act it can not be contended that jurisdiction

The Evansville and Richmond Railroad Company v. Swift.

in cases of the character of the one at bar was taken, or attempted to be taken, from the Supreme Court and given to the Appellate Court. The only other language used in the section of the statute relating to jurisdiction that could have any bearing upon the question is the words, "All cases for the recovery of money only where the amount in controversy does not exceed one thousand dollars." The amount recovered by the appellee in this case did not exceed one thousand dollars; but is the action for money only? Certainly not. It is by virtue of the proceedings that the company acquires the title to and the right of way so taken and appropriated, and the damages assessed are such as the owner sustains by reason of such appropriations. Sections 3906 and 3907, R. S. 1881.

It is by virtue of the proceedings that the railroad company acquires title, and the gist of the action is to acquire title, and the damages arise by reason of the title passing from the original owner to the railroad company. In such proceedings the owner of the land has a right to question the legality of the proceedings to appropriate. If illegal the company could acquire no title, and in so far as the question of title is involved the Appellate Court could have no jurisdiction. The Supreme Court having jurisdiction in so far as the proceedings involved the right to take the real estate, it likewise takes jurisdiction of the whole case, for, as stated in the case of *Ex parte Sweeney*, 126 Ind. 583, "It is an ancient rule, illustrated by many cases, that if a court obtains jurisdiction for one purpose it will retain it for all purposes."

In the case of *Parker v. Indianapolis Nat'l Bank*, 126 Ind. 595, it was held that the Appellate Court had jurisdiction of an application to set aside a judgment, rendered upon default, for less than \$1,000. The original judgment being rendered in a case in which the Appellate Court had jurisdiction, it retained it for all purposes, even to the extent of drawing to it jurisdiction in an application under a provision of the statute to set aside the judgment.

Sumner *et al.* v. Darnell.

This being a proceeding to appropriate real estate for the uses of the company, the principal object of the proceedings was to appropriate and acquire a title to the land, and the assessment of damages grows out of the appropriation, and the Supreme Court has jurisdiction on appeal.

The judgment is affirmed, with costs.

Filed April 8, 1891.

No. 14,651.

SUMNER ET AL. v. DARNELL.

128	38
129	347
133	38
138	145

DEED.—*Condition Subsequent.*—*Sufficiency to Defeat Estate.*—*Aiding.*—A condition subsequent that will defeat an estate created by a deed must be fairly expressed in the deed itself. The words used must create the condition. The court will not supply it, if the parties fail to express it.

SAME.—*Condition must be Clearly Stated.*—A condition may be created by any words which show clear, unmistakable intention on the part of a grantor to create an estate, or condition, regard being had to the whole of the deed in which they occur. The word "condition" need not be used, but words importing a condition must be used, or plainly inferred from the instrument and the existing facts.

SAME.—*County Seat.*—*Removal.*—*Reversion of Land Conveyed to Secure Location of.*—In 1816 the Legislature moved the county seat of Wayne county from Salisbury to Centreville, where it remained until 1874, when it was removed to Richmond. In 1819 the owner of certain land situated in Centreville, in consideration of the seat of justice having been permanently established in Centreville, and for no other consideration, conveyed it to A, B, and C, by name, the commissioners of the county, "and their successors in office, for the use of said county."

Held, that this was, in effect, a conveyance to the county, and not to them as trustees for the county; that the grantor had received a sufficient consideration for the conveyance from the presumed benefit he derived from the location of the county seat at Centreville from 1819 to 1874, and that the land conveyed did not revert to the grantor or his heirs when the county-seat was removed to Richmond.

From the Wayne Circuit Court.

J. B. Julian and *J. F. Julian*, for appellants.

H. C. Fox and *J. F. Robbins*, for appellee.

Sumner et al. v. Darnell.

MILLER, J.—This was an action by the appellants against the appellee to recover certain real estate in Centreville, Wayne county. The complaint was in four paragraphs. A demurrer was sustained to the second paragraph, and the cause was put at issue by an answer in denial.

The errors assigned in this court relate only to the overruling of a motion made by the appellants for a new trial, and to exceptions to the conclusions of law upon the special findings of fact.

The motion for a new trial was predicated upon the alleged insufficiency of the evidence to sustain the finding. We have read the evidence carefully and find that it fully and without conflict sustains the finding of facts made by the court.

The special finding, omitting the description of real estate, is as follows, viz.:

“ Having been requested by the plaintiffs in said cause to make a special finding of facts herein, and conclusions of law thereon, now find that William Sumner was a resident of Centreville, Wayne county, Indiana, from the year 1813 to the year 1840, at which last named date he removed to Hamilton county, Indiana, where he died, intestate, in the year 1868; that he left surviving him, as his sole heirs, four children, the plaintiffs in this suit, and Thomas Sumner, who died in 1883, leaving surviving him, — Sumner, his wife; that between the years 1813 and 1820 the said William Sumner was the owner in fee simple of — acres of real estate in the town of Centreville, and in the vicinity thereof, and was interested in the development of the town; that prior to the year 1816 the county-seat of said Wayne county was fixed at Salisbury, and subsequently, by an act of the General Assembly of the State of Indiana, approved December 21st, 1816, it was enacted that from and after the 1st day of August, 1817, the seat of justice in and for said county should be removed to and permanently fixed in the town of Centreville, in said county, and on the 1st day of August, 1817, said seat of jus-

Sumner et al. v. Darnell.

tice was, pursuant to said act, removed to said town of Centreville; that afterwards, to wit, on the 18th day of May, 1819, the said William Sumner, being the owner of the following real estate, to wit: (* * *), did, in consideration of the seat of justice having been permanently established in the town of Centreville, within and for said county, and for no other consideration, execute to Thomas J. Worman, Enos Grave and Beah Butler, the commissioners of said county, and their successors in office, for the use of said county forever, a warranty deed for the same; that said deed was duly recorded on the 18th day of May, 1819, in the recorder's office of said Wayne county, Indiana, in deed record "B," page 140; that, on the — day of August, 1820, the new court-house at Centreville was completed and accepted by the said county commissioners of said county, and by them taken possession of, and on said date they consented to be entered their approval and acceptance of the deed of said William Sumner of May 18th, 1819, in the record of their proceedings of said date in the following words, to wit: 'William Sumner produced a deed for the public square in the town of Centreville, given by said Sumner and wife to and for the use of Wayne county, which deed was recorded in Book B, page 140, which deed was approved and accepted by the board;' that said real estate, so conveyed by the said Sumner and wife to said county commissioners, was thenceforward continuously used by said county for the purpose of a public square until the year 1873, at which date the county-seat was removed from said town of Centreville to the city of Richmond; that on the 7th day of March, 1874, the commissioners of said county, for a valuable consideration, sold and conveyed the west half of the same to one Sabra Jones, which deed was recorded in the recorder's office of Wayne county, Indiana, in deed record 59, page 480, and, on the 15th day of June, 1874, for a valuable consideration, they sold and conveyed the east half of the real estate to the said Sabra Jones,

Sumner *et al.* v. Darnell.

which deed was recorded in the recorder's office of Wayne county, Indiana, in deed record 59, page 478; that said Sabra Jones took possession of said real estate on said dates, respectively, and that after various transfers by deeds duly executed and recorded, the following part of the real estate included in the land conveyed by said William Sumner to the said county commissioners, by deed of May 18th, 1819, was conveyed, on the 4th day of March, 1884, to defendant, William J. Darnell, who now holds possession of the same; that said deed was duly recorded in the recorder's office of said Wayne county, Indiana, in deed record No. 80, at page 121; that, prior to the commencement of this suit, the plaintiffs demanded of the defendant the possession of the same; and as a conclusion of law on the foregoing finding of facts the court finds for the defendant."

Proper exceptions were taken to the foregoing conclusions of law by the plaintiffs, and this presents for our consideration the question discussed by counsel in their elaborate briefs.

The conclusions of law deduced by the court from the special findings are assailed upon several different grounds, one of which is the claim that inasmuch as the deed was to "Thomas J. Worman, Enos Grave and Beah Butler, commissioners of Wayne county, and their successors in office, for the use of said county of Wayne," it gave to the commissioners the legal title, to hold as trustees, and limited the county to the mere *use* of the premises, and that by the removal of the county-seat the use was lost and forfeited, and the title vested *eo instanti* in the grantor or his heirs.

As we construe the grant, it was in legal effect and contemplation a conveyance to the county. Nothing in the language used indicates a design on the part of the grantor to vest the legal title in the commissioners, and their successors, as individuals to act as trustees, rather than as the agents of the county, or to impose upon them any duties or obligations other than those required of them as public offi-

Sumner *et al.* v. Darnell.

cers. The statute in force at that time did not, as does the present one, designate the corporate name and style to be assumed by boards of commissioners (act approved December 17, 1816), and the form used in this deed was, at that time, commonly used in conveying property to corporations and *quasi* corporations in this State. It is significant, also, that the entry made upon the county records by the board of commissioners, in accepting the deed, was for a deed "to and for the use of Wayne county." See, also, *Carder v. Board, etc.*, 16 Ohio St. 353; *Hayward v. Davidson*, 41 Ind. 212.

Another position taken by the appellants is stated in their brief as follows:

"But this is not all we rely upon. The *total failure* of the consideration of the Sumner deed itself worked a loss of the county's claim and gave to the Sumner heirs the right to assert their title to the square, independent of the condition subsequent."

No authority is cited in support of this position, and we know of none that will sustain it. The duration or stability of the title to land does not ordinarily depend upon the certainty or stability of the consideration paid for it. But, independently of the legal question involved, the finding informs us that the county-seat remained at Centreville from the 1st day of August, 1817, until the year 1873, long after the grantor had removed from the county. We may reasonably suppose that, if the location of the county-seat at Centreville was of advantage to the grantor, he must have received some of the benefits during the half century it remained there, and that consequently there was not an entire failure of consideration. *Hunt v. Beeson*, 18 Ind. 380; *Jeffersonville, etc., R. R. Co. v. Barbour*, 89 Ind. 375.

The remaining, and principal, contention of the appellants is, that the conveyance of the land to, or for, the use of the county was conditioned on the seat of justice of Wayne

county remaining permanently at Centreville, and that its removal to Richmond caused the land to revert to the appellants, as the heirs of the grantor.

The rule of strict construction applicable to conditions subsequent, usually expressed in the words, "Conditions subsequent are not favored in law, and are construed strictly," is elementary, and does not require the citation of authorities.

A condition subsequent that will defeat an estate created by a deed must be fairly expressed in the deed itself. The words used must create the condition. The court will not supply it, if the parties fail to express it. The rule is stated in 2 Dev. Deeds, as follows: "Section 976. Parol Condition.—Aside from the question of a reformation of a deed in cases where clauses have been omitted by mistake, it is certain that in an action to recover property conveyed by deed on the ground that a condition on which it was made has not been performed, the deed must speak for itself, and a condition can not be engrafted upon a deed absolute in form by parol evidence. The engrafting of a contemporaneous condition on a deed will in a proper action be allowed only on clear evidence of fraud, accident, or mistake."

A condition may be created by any words which show clear, unmistakable, intention on the part of a grantor to create an estate on condition, regard being had to the whole of the deed in which they occur. The word "condition" need not be used, but words importing a condition must be used, or plainly inferred from the instrument and the existing facts. Tiedeman Real Property, section 272; *Larabee v. Carleton*, 53 Maine, 211; *Rawson v. Inhabitants, etc.*, 7 Allen, 125; *Packard v. Ames*, 16 Gray, 327; *Episcopal, etc., v. Appleton*, 117 Mass. 326; *Paschall v. Passmore*, 15 Penn. St. 295; *Wier v. Simmons*, 55 Wis. 637; *Raley v. County of Umatilla*, 15 Ore. 172; 2 Wash. Real Prop. (5th ed.) 2.

It appears from the finding, *supra*, that in the year 1816, the General Assembly passed an act fixing the seat of justice

Sumner *et al.* v. Darnell.

for Wayne county permanently at Centreville from and after the 1st day of August, 1817; and that pursuant to the act, on that day, it was removed to Centreville; that afterward, on the 18th day of May, 1819, the lands in controversy were conveyed, by a general warranty deed, to the commissioners "for and in consideration of the seat of justice having been permanently established in the town of Centerville, within and for said county * * * for the use of said county of Wayne."

No other words from which any condition, limitation or right of re-entry by the grantor or his heirs are expressed in the conveyance, or in the subsequent entry made by the board of commissioners accepting the deed.

The cases cited by appellants' attorneys, and principally relied upon to show that this deed was conditioned on the seat of justice remaining at Centreville, will be examined in their order. The first one is *Stanley v. Colt*, 5 Wall. 119 (163). This was an action to recover for breach of condition a tract of land devised by the plaintiff's ancestor to an ecclesiastical society in which the property was devised to the society "to be and remain to the use and benefit of said Second or South Society and their successors forever.' Then comes the condition or limitation upon the devise: 'Provided, That said real estate be not ever hereafter sold or disposed of, but the same be leased or let,' etc.

The court held that there was not a condition subsequent, using these words: "Our conclusion is, that the construction urged by the plaintiffs, of the will, importing a condition, a breach of which forfeits the devise, is not well founded."

The next case cited is *Hunt v. Beeson*, *supra*. In this case a lot was donated by the proprietor of a town for a "tan-yard," and was used as such from 1834 to 1858. The court held that it was donated upon a condition subsequent, the condition evidently being the erection of a tan-yard on the lot, and not the perpetual maintenance of the same, for

Sumner *et al.* v. Darnell.

the court held that the condition was fully performed, and that the property did not revert upon its subsequent sale and appropriation to other purposes.

The case of *Indianapolis, etc., R. W. Co. v. Hood*, 66 Ind. 580, was a conveyance of some lots to the company "for a site for the depot of said railroad at Peru, * * * to have and to hold the premises * * * for the purposes aforesaid." The statement of the use and condition was much stronger than is contained in the deed under consideration, and it does not support the position of the appellants. We do not feel called upon to extend the rule in favor of conditions subsequent beyond that indicated in this case.

The case of *Scott v. Stipe*, 12 Ind. 74, is not well reported, but as explained in *Scantlin v. Garvin*, 46 Ind. 275, does not sustain the appellants' contention, for it is said that the grant was upon condition that a church should be erected on the lot, and that it should "forever thereafter be used as a house of worship." Also, see *Cook v. Leggett*, 88 Ind. 211.

The case of *Warren v. Mayor, etc.*, 22 Iowa, 351, was a suit by the grantor who dedicated land for a "public square," to enjoin the city from leasing or selling the same. The case is not in point.

In *Henderson v. Hunter*, 59 Pa. St. 335, the condition expressed in the grant to a church was "so long as they use it for that purpose, and no longer, and then to return back to the original owner."

We are unable to find that any of the cases cited by appellants sustains their theory of this case.

In *Heaston v. Board, etc.*, 20 Ind. 398, the conveyance was to "the board of trustees of the County Seminary of Randolph county, and their successors in office forever, to have and to hold the premises aforesaid, with all the appurtenances, to the only proper use, benefit and behoof of said 'board of trustees for the use of said seminary forever.'" It was claimed that this created a condition subsequent, and

Sumner *et al.* v. Darnell.

that the premises having ceased to be used as a seminary, the grantor was to recover the land. The court held that the corporation received an unconditional title, which was not defeated by the alleged failure to use the premises for the purposes of a seminary, or by using it for other purposes; that there was nothing in the deed that imported a condition, and that if the grantor intended that the property conveyed should only be used for a seminary edifice, or, in case it should be used otherwise, that the estate should be forfeited and revert, the condition should have been expressed or fairly implied.

In *Seebold v. Shiller*, 34 Pa. St. 133, land upon which a court-house and jail had been erected was conveyed to the commissioners by name, and their successors in office, "in trust for the use of the said county, in fee simple." The county was subsequently divided, the seat of justice removed, and trustees appointed to sell the lots. Held, that there was no reverter.

In *Adams v. County, etc.*, 11 Ill. 336, a land owner proposed that if the county-seat should be located at Pottsville he would give land for a court-house and other county purposes. The proposition was accepted, and the General Assembly passed "an act to locate permanently the seat of justice of Logan county," and it was located at Postville. Subsequently the county-seat was removed. It was held that the grantor was without remedy. The suit was to recover the money rather than land, but it was held that the deed was unconditional.

In *Harris v. Shaw*, 13 Ill. 456, land was conveyed to commissioners, by name, and their successors in office, for the use of a county forever, in consideration of one dollar, and that the county-seat had been located on the premises. The county-seat was afterwards removed, and the grantor sued to recover the land. It was held that there was no condition and that he could not recover.

The citation of authorities to this effect might be greatly

extended, but we will only refer to the following: *Raley v. County of Umatilla*, *supra*; *City of Portland v. Terwilliger*, 16 Ore. 465; *Coffin v. City of Portland*, 16 Ore. 77; *First M. E. Church v. Old Columbia, etc., Co.*, 103 Pa. St. 608; *Paschall v. Passmore*, 15 Pa. St. 307; *Rawson v. Inhabitants, etc.*, 7 Allen, 125; *Packard v. Ames*, 16 Gray, 327; *Crane v. Inhabitants, etc.*, 135 Mass. 147; *Sohier v. Trinity Church*, 109 Mass. 1; *Board, etc., v. Patterson*, 56 Ill. 111; *Lowe v. Hyde*, 39 Wis. 345; *Wier v. Simmons*, 55 Wis. 637; *Brown v. Caldwell*, 23 W. Va. 187; *Southard v. Central R. R. Co.*, 2 Dutch. 13; *Barrie v. Smith*, 47 Mich. 130; *Gage v. School District*, 64 N. H. 232; *Page v. Palmer*, 48 N. H. 385; *Morrill v. Wabash, etc., R. W. Co.*, 96 Mo. 174; *Thornton v. Trammell*, 39 Ga. 202.

It is questionable whether the appellants would be entitled to a recovery if the deed contained a condition subsequent.

It appears from the finding that the county-seat remained at Centreville from 1817 to 1873, a period of fifty-six years, and that this suit was brought more than seventy years after the location of the seat of justice at Centreville. It may fairly be presumed that the grantor, at the time he executed the deed to the commissioners, owned other property, the value of which he expected would be enhanced by the location of the county-seat, or that he had other interests to be subserved thereby. If so, we may also infer that he received, during his lifetime and while a resident of Wayne county, the substantial benefit of his donation.

In *Hunt v. Beeson*, 18 Ind. 380, it was held that the maintenance of a tan-yard for the period of twenty-four years was a substantial compliance with the condition contained in the conveyance.

In *Mead v. Ballard*, 7 Wal. 290, a conveyance upon a condition that an institute "shall be permanently located upon said lands," was complied with by the location of the insti-

Montgomery v. Craig *et al.*

tution thereon August 9th, 1848, and its remaining there until 1857.

In *Jeffersonville, etc., R. R. Co. v. Barbour*, 89 Ind. 375, the use, for thirty-three years, of lands granted "expressly for the use and purpose of depot grounds," and providing that if not used for that purpose it should revert to the grantors, was held to be a performance of the conditions, so as to prevent a forfeiture.

We find no error in the record.

Judgment affirmed.

Filed April 3, 1891.

128	48
132	62
132	132
128	48
137	214
128	48
145	204
145	208
128	48
1153	15
1153	16
128	48
158	68

No. 14,917.

MONTGOMERY v. CRAIG ET AL.

TRUSTS.—Husband and Wife.—Conveyance Taken in Wife's Name.—No Implied Trust Resulting From Payment of Purchase-Money.—Where a conveyance of real estate is taken in the name of the wife, and the purchase-money is paid by the husband, no resulting or implied trust arises in favor of the latter.

SAME.—Parol Agreement Ineffectual to Create Express Trust.—A parol agreement between the husband and the wife in such a case that the wife shall hold the land as his trustee, is ineffectual to create an express trust.

From the Jackson Circuit Court.

O. H. Montgomery, for appellant.

B. H. Burrell and *H. Shirley*, for appellees.

ELLIOTT, J.—It is alleged in the complaint that the appellant, the plaintiff below, purchased the land in dispute in January, 1881; that by an agreement made with his wife, Lucy Montgomery, he caused the conveyance to be made to her; that the land was taken in trust by Lucy Montgomery; that the purchase-money was all paid by the plaintiff; that

Montgomery v. Craig et al.

Lucy Montgomery died in 1887, and that the appellees are her heirs at law.

As the relation of husband and wife existed at the time the deed was executed, there can be no resulting, or implied, trust. *Lochenour v. Lochenour*, 61 Ind. 595.

If it were possible for the plaintiff to succeed in any event, it could only be for the reason that his wife agreed to hold the land as his trustee. Whether she had capacity to make a contract binding her to hold the land as her husband's trustee is a question we deem it unnecessary to decide, inasmuch as our judgment is that a parol agreement between husband and wife, in such a case as this, is ineffective. As no resulting trust can arise, the appellant can not possibly succeed, except upon the theory that an express trust was created in his favor by the parol agreement; but, as the law forbids the creation of an express trust by parol in cases of this character, the only theory upon which it can even be plausibly argued that he can succeed is wholly untenable. *Moore v. Cottingham*, 90 Ind. 239; *Mescall v. Tully*, 91 Ind. 96; *Columbus, etc., R. W. Co. v. Braden*, 110 Ind. 558; *Thomas v. Merry*, 113 Ind. 83; *Anderson v. Crist*, 113 Ind. 65.

This case is not a member of the class represented by the case of *Catalani v. Catalani*, 124 Ind. 54, but belongs to an entirely different class. Here, no trust can possibly arise by implication, for no fraud is shown, and the relation of the parties forbids that a trust be implied.

The case made by the complaint is one wherein the plaintiff assumes to overthrow a perfect deed by a bald parol agreement, and this the law will not permit.

Judgment affirmed.

Filed April 10, 1891.

VOL. 128.—4

 Chaplin *et al.* v. Sullivan.

No. 14,778.

CHAPLIN ET AL. v. SULLIVAN.

128	50
150	477
128	50
155	263

PRACTICE.—*Refusal to Strike Out Pleading.*—A refusal to strike out a pleading is not an available error.

SAME.—*Error in Assessment of Damages.*—*New Trial.*—Error in the amount of the assessment of damages can only be presented by a motion for a new trial.

VENIRE DE NOVO.—*Insufficient Finding.*—Error in making insufficient or indefinite findings can only be presented by a motion for a *venire de novo*.

SET OFF.—*A Set-off to a Set-off.*—A set-off can be pleaded to a set-off.

MORTGAGE.—*Mortgage to Secure Two Notes Payable to Different Persons.*—*Priority.*—A mortgage given to secure two notes identical in date, amount, and time of maturity, but payable to different persons, is equivalent to a separate mortgage to each, without giving priority to either mortgagee.

SUBROGATION.—*Purchaser of Decedent's Realty Paying Debt of the Estate.*—*Priority to Mortgage Executed by Heir.*—A purchaser of real estate of a decedent's estate, who pays off a general debt of such decedent at the request of an heir in order to prevent the real estate being sold to pay such debt, is entitled to be subrogated to the lien the creditor had on such realty by virtue of his claim as against such heir; and such lien is prior to a mortgage executed by an heir of such decedent prior to such payment.

DECEDENTS' ESTATES.—*Extent of Creditor's Lien on Realty.*—A creditor of an estate has a lien for his claim on the entire realty of the estate, and can not be confined to a particular part of it.

From the Madison Circuit Court.

H. D. Thompson, for appellants.

W. A. Kittinger and *L. M. Schwinn*, for appellee.

McBRIDE, J.—John Chaplin died intestate, in Madison county, owning certain lands in that county. He left surviving him, as his sole heirs, a widow, six living children, and the heirs of a deceased daughter. Appellant Solomon C. Chaplin is one of the children, and was appointed administrator of the estate.

Appellant Caroline Gillett and the appellee, Emma Sullivan, are daughters of said decedent. Solomon C. executed to them a mortgage on his undivided interest in said land,

to secure to each the sum of \$350, loaned him by each, both being secured by the same mortgage.

The widow had partition of the land, and one-third was set off to her in severalty.

The administrator then applied for, and procured, from the Madison Circuit Court, an order to sell the remaining two-thirds of said land to pay debts of said estate, showing in his application a deficiency of personal assets amounting to \$1,000.

To avoid the necessity for and expense of an administrator's sale of the land, the appellee bought the shares of all of said heirs, except appellant Solomon C., and agreed with each of them, as a part of the consideration, to pay their proportionate share of said debts.

Appellant did not sell her his interest in the land, but requested her to pay his share of the debts, and promised to reimburse her for so doing. She paid all the remaining debts of the estate, amounting to \$1,214.25. This would make the share of each \$173.46.

There was some conflict in the evidence as to just what the contract was, relative to her reimbursement for the sum paid by her for appellant on said debts, but as it appears from the special finding that the court accepted her version, under our rule we can not disturb the finding.

This suit was brought by appellee to foreclose the mortgage, and to recover, against Solomon, a judgment for said sum paid by her for him on said indebtedness.

With reference to the latter claim she also asks to be subrogated to the rights of the creditors of decedent, and to have said sum declared a lien on said land, senior to said mortgage.

Two questions are raised on the pleadings. Solomon answered by general denial, and by set-off. Appellee replied a set-off to his set-off. A motion by Solomon to strike out the reply of set-off was overruled, and this ruling appellant insists is erroneous.

Chaplin *et al.* v. Sullivan.

Whether this action of the court was right or wrong need not be considered, as it is well settled that refusing to strike out a pleading is not *available* error. It is not error for which a cause will be reversed. *Hoke v. Applegate*, 92 Ind. 570; *City of Crawfordsville v. Boots*, 76 Ind. 32; *Smith v. Martin*, 80 Ind. 260, and many other cases that might be cited.

A demurrer to this paragraph of reply was overruled, and the ruling is assigned as error.

This ruling was not erroneous, as the reply is clearly good.

Error is also assigned on overruling a motion for a new trial, and in the conclusions of law.

None of the questions argued as arising on the motion for a new trial are available, as they are presented. Appellants insist that the finding is not sustained by the evidence; but the evidence is conflicting, and, there being some evidence to sustain the finding, we can not, under our settled practice, disturb the conclusion reached by the trial court. It is argued that there is error in the assessment of the amount of the recovery; but this question was not raised by the motion for a new trial, and we can not consider it.

It is also argued that the court failed to find on all the issues; that there is no finding, or insufficient findings, on questions presented by the answer and reply of set-off.

The question as to insufficient or indefinite findings must be presented by a motion for a *venire de novo*.

The court, having, by request of parties, made special findings of the facts, stated its conclusions of law. The special findings were substantially in accordance with the statement of facts herein, and that there was due to each of said mortgagees the sum of \$450.66. The court further found that there was also due to appellee, on account of money paid by her for said Solomon C., in payment of his share of the debts of said estate, the additional sum of \$193.54. As conclusions of law the court held that the two mortgages were con-

Chaplin *et al.* v. Sullivan.

current in lien, and should be foreclosed together, and, in case of a deficiency in the property to pay both, they should share *pro rata* in the proceeds of the sale. It was further held that, as to the said sum of \$193.54 paid by her, the creditors of said decedent had, and were entitled to enforce, a lien upon the interest of said Solomon C. in said land, to which lien appellee became subrogated by said payment, and that she was entitled to the foreclosure of such lien, and sale of said land in preference to said mortgage. The court thereupon rendered a decree foreclosing said mortgage and said lien accordingly.

Counsel for appellant, in their brief, insist that the court erred in not decreeing priority to the mortgage of appellant Caroline Gillett. They, however, assign no reason for this claim, and we can see none. The notes to both parties were identical in date, amount, and time of maturity, and secured by the same mortgage. In a case where notes to different persons were secured by the same mortgage, but matured at different times, this court held that the holder of the note first maturing had no priority. *Goodall v. Mopley*, 45 Ind. 355. So, also, where different mortgages were made to different persons on the same day. *Cain v. Hanna*, 63 Ind. 408, and in *Moffitt v. Roche*, 76 Ind. 75, it was held that a mortgage to several persons, to secure a separate obligation to each, all made of even date, and to mature at the same time, is equivalent to a separate mortgage to each, without giving priority to any.

Appellant's principal contention is that the court erred in decreeing the lien, as to the \$193.54; and especially that it erred in giving to it priority over the mortgage.

No doctrine of equity jurisprudence is more beneficent in its operation than that of subrogation, properly applied.

One of the most familiar cases where this doctrine is applied is where the purchaser of encumbered property, without having assumed the encumbrance, pays it off and discharges it to protect his own rights, or to perfect his own

Chaplin *et al.* v. Sullivan.

title. It has been uniformly held, in such cases, that he is entitled to be subrogated to the rights of the lienholder, and is entitled to all his securities, rights, remedies, and priorities. And when one, for the protection of his own interests, thus pays the debt of another, the payment is not voluntary. Among the many authorities supporting this application of the doctrine of subrogation are the following: Harris Subrogation, sections 2, 643, 646, and 796, and cases cited; *Braden v. Graves*, 85 Ind. 92; *Muir v. Berkshire*, 52 Ind. 149; *Stiger v. Bent*, 111 Ill. 328; *Morrow v. U. S. Mortg. Co.*, 96 Ind. 21; *Vert v. Voss*, 74 Ind. 565; *Rice v. Morris*, 82 Ind. 204; *Carithers v. Stuart*, 87 Ind. 424; *Weiss v. Guerinneau*, 109 Ind. 438; *Binford v. Adams*, 104 Ind. 41; *Dunning v. Seward*, 90 Ind. 63; *Duncan v. Gainey*, 108 Ind. 579; *Gibson v. McCormick*, 10 Gill & Johnson (Md.) 65.

In the case of *Duncan v. Gainey*, *supra*, which was a case where one had bought land at an unauthorized administrator's sale, and had, by direction of the administrator, paid the purchase-price upon debts of the estate, it was held that although the sale was ineffectual to convey title, and that the land still remained liable to be sold under order of the court for the payment of debts, the purchaser, who had paid the money, was entitled to be subrogated to all the rights of the original holders of such debts, according to their respective priorities. So, in *Gibson v. McCormick*, *supra*, where one had purchased land of a devisee, and the purchase-money was used to pay the debts of the testator, it was held that he might be subrogated to the rights of the creditors.

The heirs of the decedent, John Chaplin, took the land left by him, charged with the payment of his debts. They could not escape this liability if they wished. No one could acquire any rights in the land superior to the right of the creditors of the estate to compel payment of their claim from the land if the personal assets should prove insufficient. When the appellant Gillett, and the appellee, took their mortgage, they, of course, took it subject to this right

Mansfield v. Shipp et al.

of the creditors. When appellee became the owner of six-sevenths of the land, and paid six-sevenths of the debts of the estate, her land was still subject to the payment of the remaining one-seventh of said debts. As between her and her brother it was his to pay; but as between her and the creditors, the lien covered all the land, hers as well as his. She then had the right to pay, when he did not, and was entitled to be subrogated to the rights of the creditors to have the land sold for its payment. She had this right, without request from him, to pay. The rights she thus acquired are superior to the mortgage, and she had the right to have a lien declared and foreclosed for said amount on his share of the land as against all the appellants.

There is no error in the record.

Judgment affirmed, with costs.

Filed April 9, 1891.

No. 14,966.

MANSFIELD v. SHIPP ET AL.

SUMMONS.—*Omission of Full Names of Plaintiffs.*—*Motion to Quash.*—Where the Christian names of the plaintiffs are not given in full in the summons, but are set out in the complaint, it is not reversible error to overrule a motion to quash the summons.

PRACTICE.—*Complaint.*—*Numbering Paragraphs.*—In a suit to foreclose a chattel mortgage securing two notes, where the cause of action is stated in one paragraph of the complaint, it is not error to overrule a motion to require the plaintiff to separately state and number his causes of action.

INTERPLEADER.—*Bill.*—*Sufficiency of.*—A bill of interpleader filed under section 273, R. S. 1881, which does not aver that the alleged claimant ever demanded payment of the note sued on, or claimed that it had any right to collect the note, nor aver that the defendant paid, or offered to pay, the amount due into court or surrender the mortgaged property, is demurrable.

128	55
128	358
128	55
142	473
128	55
162	392

Mansfield v. Shipp et al.

CHATTEL MORTGAGE.—Foreclosure.—Failure to Object to Form of Judgment.

—In an action to foreclose a chattel mortgage, where the notes secured waive valuation laws, but the mortgage does not, and the judgment is that the mortgage be foreclosed and the property sold according to law, to pay and satisfy the indebtedness, the judgment will not be reversed, there being no objection to its form, on the ground that the judgment is for the sale of the mortgaged property without relief.

From the Shelby Circuit Court.

B. F. Davis and *W. H. Martz*, for appellant.

T. B. Adams, *L. T. Michener* and *I. Carter*, for appellees.

OLDS, C. J.—This action was brought in the court below by the appellees against the appellant, to foreclose a chattel mortgage given to secure the payment of two promissory notes. The first alleged error discussed is the overruling of a motion by the appellant to quash the summons, for the reason that the Christian names of two of the appellees, plaintiffs below, were not given in full in the summons. The plaintiffs' names were set out in full in the complaint, but in the summons the plaintiffs were designated as *J. V. Shipp*, *M. A. Chester*, and *Jane Morrison*. The motion to quash was overruled, and the defendant answered, and there was a trial upon the merits. Section 658, R. S. 1881, provides that "No judgment shall be stayed or reversed, in whole or in part, by the Supreme Court, for any defect in form, variance, or imperfections contained in the record, pleadings, process, entries, returns, or other proceedings therein, which by law might be amended by the court below, but such defects shall be deemed to be amended in the Supreme Court; nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below." The provisions of this section are clearly applicable in this case. The summons was valid in all particulars, except the omission of the full Christian names of two of the plaintiffs. This defect might have been cured by amendment in the court below, and the de-

Mansfield v. Shipp et al.

fendant appeared and answered; and it does not appear that this defect was in any way prejudicial to the rights of the appellant. Besides, the motion was not well taken, for the reason that it was to quash the summons as to all of the plaintiffs, when as to Morrison her name was properly stated in the summons. See *Haines v. Bottorff*, 17 Ind. 348; *State ex rel. v. Hook*, 6 Blackf. 515; *Shackman v. Little*, 87 Ind. 181; *Dunkle v. Elston*, 71 Ind. 585; *Heberd v. Wines*, 105 Ind. 237; *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409; *Wolfe v. Pugh*, 101 Ind. 293; *Spence v. Board, etc.*, 117 Ind. 573.

The next question presented is the alleged error of the court in overruling a motion to separately state and number the several causes of action stated in the complaint. The suit was to foreclose a chattel mortgage securing two notes. The cause of action was properly stated in one paragraph of the complaint. *Buck v. Axt*, 85 Ind. 512; *Hannon v. Hiltiard*, 101 Ind. 310.

In *Wabash, etc., R. W. Co. v. Rooker*, 90 Ind. 581, it is held not to be error to overrule a motion to require the plaintiff to separately state and number his causes of action, when more than one is stated in a paragraph.

There was no error in this ruling of the court.

The next alleged error discussed is the ruling of the court in sustaining a demurrer to a bill of interpleader filed by the appellant. It is contended that it is not proper practice to demur to a bill of interpleader; that the right to file such a bill is given to the defendant by section 273, R. S. 1881, and it is within the discretion of the court to allow it to be filed. It is immaterial whether the filing of a demurrer and sustaining it was the proper practice or not if the plea was invalid, or there was no abuse of discretion in rejecting it.

Section 273, *supra*, provides that "A defendant against whom an action is pending upon a contract, or for specific real or personal property, may, at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand

Mansfield v. Shipp et al.

for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order."

There are no facts alleged which make it a good bill of interpleader. It is not averred that the M. P. Church, a corporation, which the appellant sought to have made a party by reason of it claiming the note for \$220, ever demanded payment of the note of the appellant, or claimed that it had any right to collect the note from the appellant, nor did the appellant pay or offer to pay the amount due upon the note into court or surrender the mortgaged property to such person as the court might direct. There was no error in sustaining the demurrer.

The next and only other alleged error discussed is, that the court erred in its conclusion of law. The contention, as stated by counsel, is, that the notes waived valuation laws and the mortgage did not, and that the judgment is for the sale of the mortgaged property without relief. There is no objection to the form of the judgment, and no motion was made to modify it. The only statement in the conclusions of law as to how the mortgaged property shall be sold is that the plaintiff is entitled to "have a foreclosure of said mortgage and said mortgaged property sold according to law, to pay and satisfy said indebtedness."

There is no error in this conclusion of law as stated. If the appellant was not satisfied with the form of the judgment as entered, he should have objected and moved to modify it, and asked to have such judgment as he claimed he was entitled to entered. This he did not do.

There is no error in the record.

Judgment affirmed, with costs.

Filed April 10, 1891.

 McNamee v. Rauck *et al.*

No. 14,619.

MCNAMEE v. RAUCK ET AL.

MECHANIC'S LIEN.—*Notice.*—*Description.*—A notice of intention to hold a mechanic's lien described the property as the "east half of the northwest quarter of section 36, township 15, range 13; also the west half of the southwest quarter of section 25, township 15, range 13." The correct description was the "northeast quarter of section 26, in township 15, range 13, except fifty acres out of the northwest corner."

Held, that the description, aided by the reference to the house itself which the notice contained, made the identification complete, notwithstanding the mistake in the designation of the section, and that the notice was sufficient as against judgment creditors claiming a superior lien.

From the Wayne Circuit Court.

C. H. Burchenal and *J. L. Rupe*, for appellant.

J. F. Kibbey, *H. U. Johnson*, *H. C. Fox* and *J. F. Robbins*, for appellees.

MILLER, J.—A single error is alleged, and that is assigned upon the ruling sustaining the several demurrers of the appellees to the complaint. The material facts stated as the cause of action may be thus summarized: Mary Jane Rauck was the owner of an undivided interest in, and in occupancy of, a tract of land in Wayne county; that the appellant, upon her employment, furnished the material and built upon the land a dwelling-house, which was completed, accepted and occupied by her in January, 1888; that, with intent to acquire a lien upon the land and building, for his work and material furnished, the appellant caused inquiry to be made of the recorder of the county as to the description of the land owned and occupied by her; and having obtained, as he supposed, a correct description of the same, he made out and filed in the recorder's office of Wayne County the following notice:

"Mary J. Rauck: Take notice, that I intend to hold a lien on the east half of the northwest quarter of section 36, township 15, range 13; also the west half of the southwest

128	59
131	190
138	59
144	100

McNamee v. Rauck *et al.*

quarter of section 25, township 15, range 13, of Wayne county, Indiana, and on the *house* thereon situate, for the sum of one thousand dollars due me this day from you, for the building of said house and the furnishing of the material thereof by me at your request, which said work was furnished on the — day of —, 1888.

“ This 14th day of January, 1888.

“ EMERY M. MCNAMEE.”

Which notice was, on the 16th day of January, 1888, duly recorded; that the notice did not correctly describe the land owned and occupied by the appellant Rauck; that there are no such lands or sections in said township and range in Wayne county, but that said Rauck did at the time own an interest in and occupy the following described real estate in Wayne county, to wit: All of the northeast quarter of section 26, in township 15, range 13, except fifty acres out of the northwest corner thereof owned by J. B. Pierce; that she did not own or occupy any other lands in Wayne county, nor had any other house been erected for her; that the appellant intended to and thought he had placed a lien upon the property she owned and occupied, and upon which he had erected the dwelling-house; that before discovering his mistake, he caused an action to be instituted in the Wayne Circuit Court for the foreclosure of the lien, and such proceedings were had that on the 16th day of March, 1888, he recovered a judgment against her for \$948 and costs, and a decree for the sale of the real estate described in the notice; that while the above action was pending, the other appellees brought suit in the Wayne Circuit Court, on simple contracts for the payment of money, against the appellee, Mary J. Rauck, and severally obtained judgments against her, prior to March 16th, for an amount exceeding the value of the interest of said Mary J. in the land; that at the time of bringing the said actions and the recovery of the judgments, they and each of them had full notice and knowledge of the foregoing facts; that said appellees claim that their

McNamee v. Rauck et al.

judgments are liens against the lands of said Mary J. Rauck, prior and superior to that of the appellant. The prayer for relief is for the reformation and correction of the notice; that a lien be declared in favor of the plaintiff superior to the judgments of the defendants and for a foreclosure.

The rule usually adopted by the courts as standards by which the adequacy of a description, in a notice of lien, is to be tested is, that if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described, with reasonable certainty to the exclusion of others, it will be sufficient. Phil. Mech. Liens, section 379. It has also been held that the same rule applies to the description of lands in notices of an intention to hold a mechanic's or material man's lien that appertains to descriptions in deeds and mortgages. *White v. Stanton*, 111 Ind. 540.

Where the description is so uncertain as to afford no reliable clue to a more definite and correct description, no lien is acquired; but where the description, though too defective and insufficient of itself to identify any particular tract of land, can, nevertheless, be aided by the introduction of extrinsic evidence in support of such averments, it will be held to be sufficient for the purpose intended, and a true description will be supplied at the hearing. *White v. Stanton, supra*.

Courts are reluctant to set aside a mechanic's claim merely for loose description, as the acts generally contemplate that the claimants should prepare their own papers; and it is not necessary that the description should be either full or precise. Phil. Mech. Liens, section 379. But when the description is void for uncertainty on its face, parol evidence is inadmissible to remedy the defect. *Munger v. Green*, 20 Ind. 38.

The principle drawn from the authorities seems to be this: That a description in a notice of lien can not be supplied

McNamee v. Rauck *et al.*

by oral evidence, but that an ambiguity may be explained and the premises identified.

The appellees cite and rely upon the case of *Lindley v. Cross*, 31 Ind. 106, where by a misdescription lots "3 and 4" were described as lots "6 and 7." An effort was made to correct the misdescription, in the action to foreclose, by alleging a mistake and showing that no third persons had acquired rights that would be affected by a correction of the mistake. It was held that the lien of the mechanic or material man is created by statute, and that the statute must be complied with; and that the court had no power to reform it.

This case has never been overruled or even criticised, but the later cases in this court, as we shall have occasion to point out, manifest a disposition to depart from the strict rule therein indicated.

The view we take of the statute regulating notices of mechanics' liens (Elliott's Supp., section 1690) renders it unnecessary for us to undertake to harmonize the decisions upon this question.

The statute in force when the case of *Lindley v. Cross*, *supra*, was decided (2 G. H., p. 299, section 650) was silent upon the subject of the description of real estate. And in all the changes and additions to this section from 1838 to 1883, no provision was made prescribing the requisites of a description of real estate in such notices.

In the amendment made to this section by the act approved March 6th, 1883, it is provided that the notice shall give "a substantial description of such lot or land on which the house, mill, manufactory, * * * or other structure may stand or be connected with, or to which it may be removed. Any description of the lot or land in a notice of lien will be sufficient, if, from such description or any reference therein, the lot or land can be identified."

This provision was doubtless intended to simplify the method of establishing liens, and being remedial in its nature

McNamee v. Rauck *et al.*

should be construed largely and beneficially so as to advance the remedy. *Marion Tp., etc., Co. v. Norris*, 37 Ind. 424; Suth. Stat. Const., section 410.

The trend of the later decisions, as well as of legislation, is in the direction of a liberal enforcement of the law giving mechanics and material men a lien upon property made valuable by their labor and material. In *De Witt v. Smith*, 63 Mo. 263, it is said: "The courts at one time were inclined to hold that enactments for mechanics' liens were in derogation of the common law, and their provisions should therefore be construed strictly against those who sought to avail themselves of their benefits. But the better doctrine now is, that these statutes are highly remedial in their nature, and should receive a liberal construction to advance the just and beneficent objects had in view in their passage."

We are then to examine the notice to determine whether, from the description or any reference therein, the land can be identified. That the land is correctly described by township and range is undisputed, but the other descriptions, according to the allegations of the complaint, are contradictory and can not both stand. Although contrary to the general rule that words of particular description will control more general terms when both can not stand together, we think that, taking into consideration the situation of the parties, as disclosed, it is much more reasonable to suppose that the mistake was in the designation of the section and other minor subdivisions of the congressional survey, which few are able to keep in mind, than in the name of the county in which the land was situate.

By rejecting then the false description, we have the lands described by township, range and county. This would not be a sufficient description, but the statute says that if from "any reference" in the notice the land can be identified it will be sufficient. The notice refers to the land, upon which the lien was to be held, as that upon which the house was situate which was built by the appellant for the owner at

McNamee v. Rauck *et al.*

her request, for which building and the material furnished therefor, she owed him \$1,000. Giving also the date when the work was performed.

We are not without authority as to the use to which the building erected by the mechanic or for which material was furnished may be put as an identification of the premises mentioned in the notice of lien. In *City of Crawfordsville v. Johnson*, 51 Ind. 397, the notice was held sufficient because the new building showed what part of the lot it covered for which the labor and material were furnished.

In *Newcomer v. Hutchings*, 96 Ind. 119, the notice was for a building on lots numbered 9 and 10, the building was erected on lots 10 and 11; the location of the building was held to be a sufficient identification of the premises, notwithstanding the misdescription of one of the lots in the notice.

In *White v. Stanton*, *supra*, the notice was for materials of a dwelling house on several lots and eighty acres of land. The names of the State and county within which the land was situate were not given. The court held that inasmuch as the notice referred to the dwelling-house as having been erected on all the lots, it was sufficient.

It appears also from the complaint that no other property answers the description in the notice, which is said to aid what might otherwise be an insufficient description. Phil. Mech. Liens, section 382.

We are of the opinion that, as against the appellants, the notice, when taken in connection with the extrinsic facts averred in the complaint, was sufficient to create a lien.

The judgment creditors are not innocent purchasers, but hold their lien subject to all prior liens and equities. *Armstrong v. Fearnaw*, 67 Ind. 429; *Foltz v. Wert*, 103 Ind. 404.

We are also of the opinion that the appellant is not precluded by the judgment rendered against the appellee Rauck from again foreclosing his lien. *Conyers v. Mericles*, 75 Ind. 443; *McCasland v. Aetna Life Ins. Co.*, 108 Ind. 130.

Gilson *et al.* v. The Board of Commissioners of Rush County.

The judgment is reversed, with costs, and the court below instructed to overrule the demurrers to the complaint, and to proceed in accordance with this opinion.

Filed April 9, 1891.

No. 15,785.

GILSON ET AL. v. THE BOARD OF COMMISSIONERS OF RUSH COUNTY.

CONSTITUTIONAL LAW.—*Uniformity of Statute.—Local or Special Legislation.*

—A statute which is of general and uniform operation throughout the State, and operates alike upon all persons, under the same circumstances, is not subject to the objection that it is special or local legislation.

SAME.—*Uniformity in Taxing District.*—If a tax law provides that the rate of assessment and taxation shall be uniform and equal throughout the locality in which the tax is to be levied, it does not violate the section of the Constitution requiring that a tax law shall provide for a uniform and equal rate of assessment and taxation.

FREE GRAVEL ROAD.—*Act of 1889 for Purchase of Road is Valid.*—The act of March 8, 1889 (Acts 1889, p. 276), providing for the purchase of toll roads is constitutional, and does not violate either section 22, article 4, or section 1, article 10, of the Constitution.

SAME.—*Majority of Votes Cast Gives Authority to Purchase.*—If the requisite number of freeholders, citizens of two or more townships, jointly petition the board of county commissioners for an election to determine if a certain designated toll road shall be purchased and made a free road, and an election is ordered and held pursuant to the request of such petition, such townships thus petitioning constitute an election district; and if a majority of all the votes cast in such district is in favor of such purchase, the purchase must be made, although a majority in one or more of the townships is against it.

SAME.—*Exemption of Realty from Taxation.—Validity of Statute.*—The provision in the statute exempting from taxation real estate previously assessed for free gravel roads, until other property has paid an amount equal to such assessments, does not render the statute void.

SAME.—*Objections to Proceedings.—When to be Made.*—Objections to the petition for an election, notice thereof, appraisal of the road, and regu-

VOL. 128.—5

128	65
181	94
181	591
183	336
183	647
128	65
134	555
135	38
135	347
128	65
137	230
137	564
137	572
138	624
128	65
145	250
147	490
147	503
128	65
151	145
128	65
153	255
128	65
155	487
156	165
156	168
156	518
128	65
157	237
128	65
158	550
158	554
128	65
162	204
162	686
162	687
128	65
163	608
128	65
167	67
168	67
128	65
170	610
170	611

Gilson *et al.* v. The Board of Commissioners of Rush County.

larity of the election must be made before the final order for the purchase of the road is entered by the board of county commissioners.

STATUTE.—Object in Construing.—Isolated Words or Sentences.—The object to be attained in construing a statute is to ascertain the intention of the Legislature which passed it, which intention is to be ascertained by looking to the whole statute, and not in the consideration of isolated words, or sentences.

From the Rush Circuit Court.

J. H. Mellett and M. E. Forkner, for appellants.

J. Q. Thomas, K. M. Hord and E. K. Adams, for appellee.

COFFEY, J.—By an act of the General Assembly, approved March 8, 1889 (Acts of 1889, p. 276), it is provided that the county commissioners of any county in this State, when petitioned therefor by fifty freeholders, citizens of any township, or townships, in the county, where a toll-road is located, shall submit to the voters of said township, or townships, in such county through which said road may pass, at a regular or special election, giving at least twenty days' notice in a newspaper of general circulation published in said county, and by posting up written or printed notices thereof at each voting place in said township, or townships, the question of purchasing turnpikes, or toll-roads, in said township, or townships. The vote on such question is required to be certified by the proper officers of election to the county commissioners, and, if a majority of the votes at such election is in favor of the purchase, it is made the duty of such board to purchase such toll-road. Before such election is held it is the duty of the board of commissioners to appoint a surveyor, or engineer, of the county, and two disinterested freeholders of the county, one of such freeholders to be selected by the board, and the other by the company owning the road, to view the road to be purchased, and determine the consideration to be paid for the same. It is further required that the consideration to be paid shall be published as a part of the notice of election.

Upon the order for the purchase of such toll-road, or a

Gilson et al. v. The Board of Commissioners of Rush County.

section thereof, being made by the board of commissioners, the company owning such road is required to execute and deliver to such board a written deed, under the seal of the company, conveying to the board the road, or section thereof, described in the petition, including the bridges on the line thereof, and thereupon the board of commissioners may issue to such company the bonds of the county, payable in instalments, or at annual intervals, not exceeding, in all, the period of five years, bearing interest at a rate not exceeding six per cent., payable annually.

For the purpose of raising money necessary to meet said bonds, and the interest thereon, the board of commissioners is required to levy an annual tax upon the property of the township, or townships, voting for such purchase, in such manner as to meet the principal and interest of said bonds. If the road, or section thereof, purchased, runs into, or through, two or more townships, the amount paid therefor is to be divided and charged upon the property in such townships in proportion to the assessed value thereof purchased in each township.

Lands which have been previously assessed for the construction of free gravel roads are exempt from taxation under the provisions of this act until all other lands in the township shall have been assessed an amount equal to the assessment made under the act for the purchase of toll-roads.

Toll-roads purchased under this act are made free, and are to be kept in repair as roads constructed under the free gravel-road laws of the State.

Under the provisions of this statute fifty freeholders of the townships of Center, Jackson, and Rushville, in Rush county, in the month of December, 1889, filed in the office of the auditor of said county a petition signed by them, praying the board of commissioners of said county to submit to the voters of said townships, at a special election, the question of purchasing a certain toll-road extending through said townships, from the city of Rushville, in said county, to the

Gilson et al. v. The Board of Commissioners of Rush County.

town of Knightstown, in Henry county, known as the Rushville, Raysville, and Knightstown Gravel Road.

Such proceedings were had under this petition that the road was appraised, the election was ordered, notice thereof given, the election held, and a return thereof made to the Board of Commissioners of Rush county. The board determined that a majority of the votes cast at such election was in favor of the purchase of the road, and thereupon entered an order to purchase the same, took a conveyance thereof from the company owning it, and issued to the company the bonds of Rush county in payment therefor. A majority of the votes cast in Center township was against the purchase, but a majority of all the votes cast in the three townships voting at such election was in favor of purchasing the road. The amount to be paid for the road was apportioned among the three townships as follows: Center township, \$4,439.60; Jackson township, \$2,632.98; and Rushville township, \$849.25.

This action was commenced by the appellants, who are resident freeholders and tax-payers of Center township, in the county, to enjoin the board of commissioners from levying a tax to meet the principal and interest of the bonds issued by Rush county, in payment for the toll-road so purchased pursuant to the prayer of the petition above referred to. The court sustained a demurrer to the complaint, and this ruling is called in question here by a proper assignment of error.

The first contention of the appellants is, that the act of the General Assembly under which the appellee assumed to purchase the toll-road in question is void, as being in conflict with section 22, article 4, and section 1, article 10, of our State Constitution.

So much of section 22, article 4, as is material to the controversy here, reads as follows: "The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For the assessment and

Gilson *et al.* v. The Board of Commissioners of Rush County.

collection of taxes for State, county, township, or road purposes."

Section 1, article 10, is as follows: "The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law."

It is held that a statute which is of general and uniform operation throughout the State, and operates alike upon all persons, under the same circumstances, is not subject to the objection that it is special or local legislation. *State, ex rel., v. Reitz*, 62 Ind. 159; *McLaughlin v. Citizens, etc., Ass'n*, 62 Ind. 264; *Heanley v. State*, 74 Ind. 99; *Elder v. State*, 96 Ind. 162.

The statute we are now considering is of uniform operation throughout the State of Indiana, and applies alike to all persons coming within its operation, and is not in conflict with the provisions of section 22, article 4, of our State Constitution.

The question as to whether it is in conflict with section 1, article 10, above quoted, is a much more serious question. This provision of our Constitution received a construction in the case of *Bright v. McCullough*, 27 Ind. 223. It was said in that case: "The section does not require that the rate of assessment shall be uniform and equal for all purposes throughout the State; and we think its meaning clearly is, that the rate of assessment and taxation must be uniform and equal throughout the locality in which the tax is levied."

So, again, it received a construction in the case of *Lafayette, etc., R. R. Co. v. Geiger*, 34 Ind. 185. That was a suit to enjoin the levy and collection of a tax in aid of the construction of a railroad. It was contended that inasmuch as the railroad ran through the counties of Madison, Tipton,

Gilson *et al.* v. The Board of Commissioners of Rush County.

Clinton, Tippecanoe, and Benton, in this State, it was necessary that each and all of the counties must vote for an appropriation, and assess the same amount of tax in each county to make it uniform and equal. In answer to this contention the court said: "If the tax assessed is equal and uniform in the county where assessed, it will be in strict accordance with the requirements of the Constitution." See, also, *John v. Cincinnati, etc., R. R. Co.*, 35 Ind. 539.

It is not unusual for the Legislatures of the several States in the Union, in the exercise of the general power of taxation, as well as in the power of local assessments, to create a special taxing district, without regard to municipal or political subdivisions of the States, and to levy a tax on all property within such district by a uniform rule, according to its value, for the purpose of aiding in the construction of public local improvements.

Our laws providing for street improvements, for the construction of free gravel roads, for the construction of ditches and drains, and for aid in the construction of railroads, are examples of this kind of legislation.

True, in most cases, such improvements are paid for by local assessments against real property, which, in theory, is benefited to an amount equal to the assessment. But it is by no means universally true that such improvements are paid for by assessments against real estate supposed to be benefited; but, on the contrary, they are often paid for by the assessment of a tax on all property found within the taxing district. The doctrine announced in *Bright v. McCullough, supra*, that the requirements of section 1, article 10, are fulfilled when the rate of assessment and taxation is uniform and equal throughout the taxing locality, has often been affirmed by this court. *Palmer v. Stumph*, 29 Ind. 329; *Anderson v. Kerns Draining Co.*, 14 Ind. 199; *Goodrich v. Winchester, etc., T. P. Co.*, 26 Ind. 119.

In the case of *Bowles v. State*, 37 Ohio St. 35, the question now under consideration was discussed at some length

Gilson et al. v. The Board of Commissioners of Rush County.

by the Ohio court. The case involved the constitutionality of a statute passed by the General Assembly of that State authorizing the assessment of all property, both real and personal, within a given district, to pay for the construction of a free turnpike road.

It was contended that the Legislature had no power to create a taxing district without regard to the boundaries of the political, or municipal, subdivisions of the State, and in answer to this objection the court said: "That the power is not expressly inhibited is clear, and we are persuaded that there is no implication against it, from the fact that it has always been exercised without challenge in divers ways for the purpose of promoting local advantages, not only in the exercise of the power of local assessments, where the burden of local improvements has been placed upon property specially benefited, and in proportion to the benefits, but by general taxation upon local districts other than municipal or political subdivisions. Notably, special taxing districts have been created for the purpose of supporting and maintaining schools and highways by the subdivisions of townships; and we can see no difference in principle between such legislation and the statute under consideration."

These several adjudications seem to be in exact accord with the elementary books upon the same subject: *Cooley Taxation* (Ed. 1876), p. 113; see, also, pp. 110, 111, 112; *Elliott Roads and Streets*, 392, 393.

Judge Cooley, at page 113, in discussing this question, says: "Taxing districts may be as numerous as the purposes for which taxes are levied. The district for a single highway may not be the same as that for the school-house located upon it. It is not essential that the political districts of the State shall be the same as the taxing districts, but special districts may be established for special purposes, wholly ignoring the political divisions. A school district may be created of territory taken from two or more townships or counties, and the benefits of a highway, a levee

Gilson *et al.* v. The Board of Commissioners of Rush County.

or drain may be so peculiar that justice would require the cost to be levied either upon part of a township or county, or upon parts of several such subdivisions of the State. The political subdivisions of the State are necessarily regarded in taxation only where the tax itself is for a purpose specially pertaining to one of them in its political capacity, so that, as already stated, the nature of the tax will determine the district."

Many authorities are to be found to the same effect, among which are *People v. Central Pacific R. R. Co.*, 43 Cal. 398; *County Judge v. Shelby R. R. Co.*, 5 Bush, 225; *Challiss v. Parker*, 11 Kan. 394; *People, ex rel., v. Draper*, 15 N. Y. 532; *Buffalo, etc., R. R. Co. v. Board, etc.*, 48 N. Y. 93; *Litchfield v. McComber*, 42 Barb. 288; *Sangamon, etc., R. R. Co. v. County of Morgan*, 14 Ill. 163; *Bakewell v. Police Jury*, 20 La. Ann. 334; *Inhabitants of Norwich v. County Commissioners*, 13 Pick. 60; *Inhabitants of Brighton v. Wilkinson*, 2 Allen, 27; *Salem Turnpike v. County of Essex*, 100 Mass. 282; *Missouri River, etc., R. R. Co. v. Morris*, 7 Kan. 210.

In the passage of the statute under examination the Legislature took into consideration that those living in the immediate vicinity of a toll-road had a special interest in having it made free, and that they would reap an advantage therefrom not enjoyed by those residing in a remote part of the county; and hence it imposed upon those who thus received a special benefit the burden of paying for the same in the event they desired to purchase such road, and make it free. There can be no difference in principle between taxation to construct a free gravel road, and taxation to purchase a toll-road already constructed, and make it free to all. The mode usually employed to raise funds with which to construct free gravel roads is by assessments on real estate supposed to be benefited; but that mode is pursued simply because the Legislature has seen fit to declare it a proper one.

We can not say that a person who possesses personal property only, may not be benefited by the construction of a

Gilson *et al.* v. The Board of Commissioners of Rush County.

free gravel-road, or by the purchase of a toll-road to become free, in an amount equal to the taxes paid by him for that purpose. Judge Elliot, in his work on Roads and Streets, p. 393, says: "The weight of authority * * is overwhelmingly in favor of the right of the Legislature to determine what property shall be assessed and how the apportionment shall be made."

In this statute the Legislature, in the exercise of that right, has determined that both real and personal property shall be taxed, and that it shall be apportioned among the several townships through which the toll-road runs, if they by proper vote determine to purchase such road.

This statute not only provides for taxing districts, but it divides such districts into two classes, namely:

First. Districts composed of a single township, where it determines to purchase a toll-road, or a part of a toll-road, within its limits; and,

Second. A district composed of two or more townships where they jointly determine, by a proper vote, to purchase a toll-road, or part of a toll-road, running into or through all the townships voting for such purchase.

This case falls within the second class, and if a majority of the votes cast in that district was in favor of purchasing the toll-road mentioned in the complaint, it was the duty of the board of commissioners of Rush county to make such purchase. The contention that the other townships had no power to vote a tax upon Center township without its consent, is not tenable, for the reason that Center township elected to become a part of the taxing district by signing the petition praying the board of commissioners to make a purchase of the toll-road, in the manner prescribed by law. Had there been no freeholders found in Center township to sign the petition, then it would have been impossible to vote a tax on the property of that township with which to purchase the toll-road; but when its freeholders saw fit to join with the other two townships in a petition to purchase the

Gilson et al. v. The Board of Commissioners of Rush County.

road, we think it became a part of the taxing district, and took its chances on the result of the vote upon the question submitted.

The only object to be attained in construing a statute is to ascertain the intention of the Legislature which passed it, and such intention is to be ascertained by looking to the whole statute, and not in the consideration of isolated words, or sentences. In our opinion, it was the intention of the Legislature, in passing the act under consideration, that where two or more townships joined in a petition to the board of county commissioners to purchase a particular toll-road, all the townships joining in such petition should be taxed to pay for the same, in the event a majority of the votes cast was in favor of such purchase, though there may have been a failure to obtain a majority in one of the townships. Where the townships have joined in such petition, and the vote is in favor of the purchase, the townships thus voting may well be said to have voted in favor of such purchase. The result of holding otherwise might be that two townships would purchase the two ends of a toll-road, while a majority of one vote in a township between the two would defeat the purchase of the center, and thus destroy the value of the road as a free thoroughfare. We do not think it was the intention of the Legislature to permit such a result. The contention that the elections, in all cases under this law, are to be several, is destroyed by the provision made for a joint petition. Had it been the intention of the Legislature that the purchase should depend on the result of the election in each township, it is reasonable to assume that the Legislature would have provided for several petitions and several elections, and would have made no provision for joint petitions and a joint election.

The provision of the statute that each township through which the road passes shall pay the appraised value of that part of the road located in the township is not objectionable. It proceeds upon the assumption that the citizens of that town-

Gilson *et al.* v. The Board of Commissioners of Rush County.

ship will receive a special benefit, by making the toll-road free, equal to the amount paid by them for that purpose. As we have seen, the question of apportionment was one for the Legislature, and unless it affirmatively appears that the Legislature has so far abused its discretion as to take private property for public use without compensation, the courts have no power to interfere. Nothing of the kind appears in this case.

Nor do we think the provision in the statute exempting from taxation real estate previously assessed for free gravel roads, until other property has paid an amount equal to such assessments, renders the statute void. It does not appear that there is any such real estate in any of the townships to be taxed for the purchase of the toll-road in question.

Indeed, we can not know that any case will ever arise in which this provision will have any application.

In the case of *Bowles v. State*, *supra*, this objection was urged against the statute then under consideration, and in answer to this objection it was said by the court: "Inasmuch, therefore, as the statute under consideration may have a constitutional operation, must it be declared absolutely void, because, under certain circumstances, which may or may not exist, the operation of the statute would violate the principle of uniformity required by the Constitution as an essential rule in the imposition of taxes? We think not."

It is unnecessary to inquire now what would be the effect of this provision should a case arise to which it is applicable. It is sufficient to say that no such case is before us, and that anything we might say upon the subject would be mere *dicta*.

In our opinion, the statute before us is not subject to any of the constitutional objections urged against it, and is a valid enactment.

Numerous objections are urged against the petition, the manner in which the consideration to be paid for the toll-road was ascertained, and to the notice of election.

Gilson *et al.* v. The Board of Commissioners of Rush County.

In our opinion, these objections come too late. The statute before us confers upon the board of commissioners of the county exclusive original jurisdiction to receive and pass upon the sufficiency of the petition, the sufficiency of the report made by the persons appointed to ascertain the consideration to be paid for toll-roads, the sufficiency of the notice of election, and the result of the election. In passing upon these questions the board of commissioners acts in a judicial capacity. These matters must all be passed upon by the board before the order for the purchase of the road is entered. When the order for the purchase of the road is made these questions are, therefore, conclusively adjudicated.

Objections to the petition, notice, appraisal, or regularity of the election must be made, if made at all, before the final order for the purchase of the road is entered by the board of commissioners. *Jackson v. State*, 104 Ind. 516; *Peters v. Griffie*, 108 Ind. 121; *McMullen v. State*, 105 Ind. 334; *Young v. Sellers*, 106 Ind. 101; *Million v. Board, etc.*, 89 Ind. 5; *Dewey v. State*, 91 Ind. 173; *Stoddard v. Johnson*, 75 Ind. 20; *Osborn v. Sutton*, 108 Ind. 443; *Ely v. Board, etc.*, 112 Ind. 361; *White v. Fleming*, 114 Ind. 560; *Strieb v. Cox*, 111 Ind. 299; *Black v. Thompson*, 107 Ind. 162; *Hobbs v. Board, etc.*, 116 Ind. 376; *Board, etc., v. Hall*, 70 Ind. 469; *Reynolds v. Faris*, 80 Ind. 14; *Hilton v. Mason*, 92 Ind. 157; *Hill v. Probst, etc.*, 120 Ind. 528; *Loesnitz v. Seelinger*, 127 Ind. 422.

Under the authorities above cited it must be held that the questions involving the sufficiency of the petition, the regularity of the report of those appointed to appraise the road, the sufficiency of the notice of the election, and the regularity and result of such election, are questions which were adjudicated by the board of commissioners of Rush county before entering an order for the purchase of the toll-road named in the complaint, and, having been so adjudicated by that tribunal, they are not subject to investigation in a collateral proceeding like this.

McHenry v. Knickerbacker *et al.*

We have carefully examined all the other questions presented by the record, and feel warranted in saying that the court did not err in sustaining the demurrer to the complaint in this cause.

Judgment affirmed.

Filed April 10, 1891.

No. 14,825.

McHENRY v. KNICKERBACKER ET AL.

MECHANIC'S LIEN.—*Surety on Contractor's Bond can not Enforce Lien for Materials Furnished.*—A surety on a contractor's bond who undertakes that the contractor shall pay for all materials used in the building can not enforce a lien for materials furnished by him at the request of such contractor.

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6161 615

From the Dearborn Circuit Court.

H. D. McMullen, G. M. Roberts and C. W. Stapp, for appellant.

J. K. Thompson and A. Q. Jones, for appellees.

ELLIOTT, J.—The appellant, in his complaint, alleges that he furnished materials for the erection of a building which John S. Morris had undertaken to erect for the appellees, and that notice of his intention to hold a lien was duly given and recorded. The answer of the appellees sets forth the contract with Morris, and a bond executed by the appellant and others to secure the performance of the contract by Morris, the principal contractor. The contract with Morris provided that he should furnish and pay for all materials used in the building; and further provided that the appellees might, at any time, make such alterations in the plan, or work, as they should deem proper.

We have no doubt as to the sufficiency of the answer.

McHenry v. Knickerbacker et al.

The appellant undertook that the principal contractor should furnish and pay for all materials used in the building, and he can not, in the face of this undertaking, demand compensation for materials furnished at the request of the contractor. It would violate the plainest principles of justice to permit the appellant to enforce a lien, for it would allow him to exact payment for property which he had explicitly promised should be paid for by another.

The reply endeavors to avoid the answer by showing that changes were made by the appellees; but the effort is fruitless. The contract between Morris and the appellees gave them the right to make such changes as they deemed necessary, and they can not be made to suffer for doing what their contract gave them a right to do. If there had been no right to make changes, the decision in *Judah v. Zimmerman*, 22 Ind. 388, would exert an important influence; but the contract expressly confers such a right, and hence that case is not relevant to the matter here in dispute.

The effect of the legal principles we have stated is not changed by the fact that the appellant was one of several sureties, for he is precluded from doing what his contract forbids, and so are his co-sureties. No one of them, nor all combined, can enforce payment for materials used in the construction of the building, for the plain and unanswerable reason that they have undertaken that their principal shall pay for all materials and work.

Judgment affirmed.

Filed April 11, 1891.

The Blue Ridge Marble Company v. Duffy.

No. 15,010.

THE BLUE RIDGE MARBLE COMPANY v. DUFFY.

ESTOPPEL.—*Sale of Real Estate.*—*Acquiescence.*—*Pleading.*—In an action to enjoin the sale of certain real estate on execution to satisfy a judgment in favor of the defendant and against a third person, the complaint alleged that before the judgment was recovered the real estate was conveyed to the plaintiff and the deed recorded on the same day. The answer alleged that at the sale on execution (which took place after the complaint was filed) the plaintiff stood by and saw the real estate sold as the property of the judgment debtor and purchased by the judgment creditor and made no claim thereto, but it failed to allege that the defendant had no notice of the sale to the plaintiff of the real estate in controversy.

Held, that the answer was insufficient as a plea of estoppel, and was demurrable.

From the Bartholomew Circuit Court.

J. W. Morgan, for appellant.

G. W. Cooper and *C. B. Cooper*, for appellee.

COFFEY, J.—This was an action by the appellee against the appellant, and one Brown, as the sheriff of Bartholomew county, to enjoin the latter from selling, on an execution in his hands, certain described real estate in said county. The complaint alleges that the appellant recovered a judgment in the Bartholomew Circuit Court against one Godfrey, on the 23d day of March, 1888; that the clerk of said court issued an execution on said judgment, and placed the same in the hands of said Brown, as the sheriff of said county, who levied the same on the real estate described in the complaint as the property of said Godfrey, and was threatening to sell the same in satisfaction of said judgment; that said real estate was not the property of said Godfrey at the time said judgment was rendered, nor at the time of said levy; that on the 21st day of March, 1888, said Godfrey conveyed said real estate to the appellee, by deed, which was duly recorded on the same day. Prayer for an injunction. The complaint was filed on the 7th day of July, 1888.

The Blue Ridge Marble Company v. Duffy.

To this complaint the appellant filed an answer, the second paragraph of which avers that the real estate described in the complaint was sold by said Brown, as such sheriff, on the execution described, on the 11th day of August, 1888; that appellant purchased the same for the sum of \$250, and the costs of sale, amounting to \$34; that the appellee, at the time of the sale, stood by and saw said real estate sell as the property of Godfrey, and made no claim thereto; that appellant, at the time of the commencement of this suit, was a non-resident of the State, and had no notice of the pendency thereof; that no summons was issued against the appellant, or publication made, and that no notice of the pendency of this action was given at the time of the sale, and that the appellant was ignorant thereof at the time of the purchase.

A demurrer was sustained to this answer, and appellant excepted. The only question in the case relates to the propriety of the ruling of the circuit court in sustaining the demurrer to this answer.

The answer is pleaded upon the theory that the matters therein set out estopped the appellee from maintaining her action for an injunction. As a plea of estoppel this answer is clearly insufficient. *Hosford v. Johnson*, 74 Ind. 479. It admits that the appellee's deed was duly recorded on the 21st day of March, 1888, two days prior to the date of the appellant's judgment against Godfrey, and does not deny that appellant had notice of appellee's title at the time of the purchase at the sheriff's sale.

Nor does the answer aver that the appellant acted upon the silence of the appellee.

This was not a secret title, but it was one of which notice had been promptly given to the world in the manner prescribed by law, and of which the appellant was bound to take notice.

The court did not err in sustaining a demurrer to this answer. Judgment affirmed.

Filed April 11, 1891.

Messick v. The Midland Railway Company.

No. 14,779.

MESSICK v. THE MIDLAND RAILWAY COMPANY.

EASEMENT.—*Parol License.*—*When Irrevocable.*—A naked parol license to enjoy an easement over land is revocable by the licensor at any time while it remains executory, but an executed parol license to use another's land, granted upon a consideration, or upon the faith of which money has been expended, can not be revoked.

QUIETING TITLE.—*Insufficiency of Answer Setting up an Easement.*—In an action to quiet title, an answer which, without denying plaintiff's title, sets up an easement in the land as a full defence to the action, is demurrable.

SAME.—*Railroad.*—*Easement.*—*Directing Verdict.*—In a suit against a railroad company to quiet title, where it was a material question whether the company had a valid easement in the land, depending upon whether the entry upon said land by the company and the construction of the roadway were with the knowledge and consent of the owner, and the owner testified that he objected to and protested against the entry, which statement was not denied by the defendant, it was error in the court to take the case from the jury and direct a verdict for the company.

PRACTICE.—*Overruling Demurrer to Bad Answer.*—Sustaining a demurrer to a good special answer, when the facts pleaded can be shown under the general denial already in, is not available error, but it is otherwise where the court overrules a demurrer to a bad answer. Such error is fatal.

From the Montgomery Circuit Court.

T. E. Ballard and E. E. Ballard, for appellant.

T. F. Davidson, for appellee.

MCBRIDE, J.—The appellant brought suit to quiet her title to a tract of land in Montgomery county, alleging in her complaint that she was the owner of the same in fee simple, and that the appellee claimed an interest therein adverse to her rights, which claim, it was alleged, was without right and unfounded, and cast a cloud upon her title. Appellee answered by general denial, and by a special answer, alleging, in substance, that in the year 1873 Thomas H. Messick, appellant's husband, owned the land in controversy, and that the Anderson, Lebanon, and St. Louis Railroad Company, a corporation organized under the laws of this State, was at the time engaged in constructing a line of railroad, and had located the same upon and

128	81
128	355
128	386
129	477
128	81
130	380
128	81
131	238
131	257
133	118
128	81
138	109
128	81
163	145
128	81
164	181
164	605
128	81
166	449

Messick v. The Midland Railway Company.

across said land ; and that with the express leave and license of said Thomas H. Messick they entered upon and appropriated a strip of land one hundred feet wide, being the same land in controversy in this action ; that said Messick was, at the time, a director of said corporation, which thereupon proceeded to, and did, grade its said railroad across said land, and about the year 1874 completed said grade, expending thereon the sum of \$5,000, and had said grade completed ready for the laying of ties and rails thereon, forming a plainly visible roadway, fit only for railroad purposes, and forming a necessary part of a continuous grade extending for many miles in both directions, and that all was done with the knowledge and consent of said Messick. The answer further avers that said corporation thereafter borrowed money to finish and equip its said road, and to secure said loan mortgaged all of its property ; and shows that the appellee succeeded to its rights by purchase at judicial sale under foreclosure of said mortgage. It is also alleged that appellant acquired her title through a judicial sale of the rights of said Thomas H. Messick in said land. The answer alleges that appellee's rights were acquired in April, 1885, and that it has, since said time, entered upon said premises, restored said grade, and laid down thereon railroad ties and iron, and has now a complete railroad thereon, on which it has, with the knowledge of appellant, expended large sums of money.

The court overruled a demurrer to this answer, and this presents the first question in the record.

Appellant insists that this answer shows that said Anderson, Lebanon, and St. Louis Railroad Company acquired, at most, a mere naked parol license to enter upon said premises, revocable at the pleasure of the licensor, and which was terminated by the conveyance of the title of said Thomas H. Messick.

In this they are wrong. A naked parol license to enjoy an easement over land is revocable by the licensor at any time while it remains executory. An executed parol license

Messick v. The Midland Railway Company.

to use another's land, granted upon a consideration, or upon the faith of which money has been expended, can not be revoked.

If the licensee, relying upon the grant, enters upon the premises and expends considerable sums of money thereon, with the knowledge of the owner of the premises, such license can not be revoked. *Buchanan v. Logansport, etc., R. W. Co.*, 71 Ind. 265; *Lane v. Miller*, 27 Ind. 534; *Snowden v. Wilas*, 19 Ind. 10; *Stephens v. Benson*, 19 Ind. 367; *Evansville, etc., R. R. Co. v. Nye*, 113 Ind. 223; *Midland R. W. Co. v. Smith*, 113 Ind. 233.

If this answer had been filed as a partial answer as to the easement claimed by appellee only, it would have been good; but it is filed as a full answer to the entire cause of action, and unless it is sufficient to bar the entire cause of action it is bad. *Mark v. Murphy*, 76 Ind. 534; *McLead v. Aetna L. Ins. Co.*, 107 Ind. 394; *Farman v. Chamberlain*, 74 Ind. 82; *Robbins v. Magee*, 76 Ind. 381; *Pouder v. Tate*, 76 Ind. 1; *Franklin L. Ins. Co. v. Dehority*, 89 Ind. 347.

If appellant has any title in the land, she is entitled in this action to have it quieted. If she owns the fee, she is entitled to have her title to the fee quieted. If appellee has a valid easement, she is entitled to have her title to the fee quieted, subject to such easement. This answer contains no denial of her ownership of the fee, and counsel for appellee says: "It is true that the ownership of the fee in appellant was not denied, but she was not entitled to have her interest in the fee quieted as against one who made no claim to it." If the appellee had filed a disclaimer as to the fee, or if it had limited its special answer to the easement it claims, there would be some force in this; but when it files its answer, which upon its face purports to be a full answer to the entire complaint, it can not be said it was making no claim to the fee. A disclaimer of this character, which is found in the record for the first time, when it appears in the brief of counsel on appeal to this court, comes too late. It must

Messick v. The Midland Railway Company.

be remembered that we are considering the question only as it is presented by the pleading. No answer was necessary but the general denial, as under that answer in this class of actions all defenses, whether partial or complete, may be shown. In such a case, sustaining a demurrer to a good special answer would not be available error; but overruling a demurrer to a bad answer is error for which the case must be reversed. *Abdil v. Abdil*, 33 Ind. 460; *Over v. Shannon*, 75 Ind. 352; *McComas v. Haas*, 93 Ind. 276; *Epperson v. Hostetter*, 95 Ind. 583; *Sims v. City of Frankfort*, 79 Ind. 446; *Weir v. State, ex rel.*, 96 Ind. 311; *Thompson v. Lowe*, 111 Ind. 272.

Several other questions are presented by the record, but as they may not arise on another trial of the cause we will notice only one of them. At the conclusion of the evidence the appellant presented to the court, and asked to have given to the jury, several special instructions, but the court refused all of them, and at the request of the appellee gave to the jury the following instruction, and no other: "The plaintiff has failed to make a case entitling her to recover in this action, and you will, therefore, find for the defendant." The jury did so find.

A material question in the case was whether or not appellee had a valid easement in the land in controversy. This depended upon whether the entry upon said land, and construction of said railroad, were with knowledge and consent of the then owner, Thomas H. Messick. If the entry was against his will, and over his objection and protest, and was not acquiesced in by him, those entering were trespassers, and could not acquire a valid easement. Thomas H. Messick was a witness, and denied that the entry was with his consent, and testified that he objected to and protested against it. There was sufficient testimony to entitle appellant to have the question passed upon by the jury. The evidence showed, without conflict or contradiction, that Mrs. Messick owned the fee in the land. The appellee, not disputing this, insisted

The Gammon Theological Seminary v. Robbins *et al.*

that it was the possessor of a valid easement, and the burden was on it to establish that fact. The testimony being conflicting, it was a clear invasion of the province of the jury to take the question from them and direct a verdict. If there is any conflicting evidence, however slight, upon the point in issue, it must be left to the jury. *Adams v. Kennedy*, 90 Ind. 318. *Boling v. Howell*, 93 Ind. 329; *Lawrenceburgh, etc., R. R. Co. v. Montgomery*, 7 Ind. 474; *Haynes v. Thomas*, 7 Ind. 38; *Crookshank v. Kellogg*, 8 Blackf. 256; *Babcock v. Doe*, 8 Ind. 110.

The fact that said Thomas H. Messick was a director in said corporation can make no difference. A corporation may, by its agents, commit a trespass upon the lands of one of its directors as well as upon the lands of any other person. The fact that Messick was a director and officer might have been considered by the jury in connection with other evidence in determining whether the entry upon the land was with his knowledge, and was acquiesced in by him, or was without his knowledge, and the grading thereon done over his objection and protest, as claimed by appellant; but the evidence upon that point, conflicting as it did, the court erred in directing the verdict.

The judgment is reversed, at appellee's costs.

Filed April 11, 1891.

No 15,936.

128	85
136	339

THE GAMMON THEOLOGICAL SEMINARY v. ROBBINS ET AL.

GIFT.—*Inter Vivos.—Retention of Possession.—Effect of.—Written Instrument.*

—*Construction of.*—R. executed an instrument in writing which contained the following provision: "I, John Robbins, * * hereby give to the trustees, etc., the principal of a note of seven hundred dollars, * * said sum of seven hundred dollars to be given in trust to the said trustees when the said note falls due, on the 4th day of August,

The Gammon Theological Seminary v. Robbins *et al.*

1890, and to be by them invested according to their best judgment." The possession of the promissory note was retained by R. and was never delivered by him to the trustees.

Held, that the written instrument did not constitute a gift *inter vivos*, and that the promissory note mentioned therein did not become the property of the trustees.

Held, also, that the writing constituted a mere agreement to give a sum in the future, and that under it no property passed.

SAME.—*What Constitutes.*—*Necessity of Delivery.*—*Character of Delivery.*—To constitute a valid gift *inter vivos* of personal property, there must be a delivery of the article during the lifetime of the donor, with an intention to give. A manual delivery, however, is not always necessary. It will be sufficient if the delivery is as complete as the thing and the circumstances of the parties will permit.

From the Henry Circuit Court.

M. E. Forkner, for appellant.

A. L. Nichols and *C. S. Hernley*, for appellees.

OLDS, C. J.—John Robbins, late of Henry county, Indiana, died intestate, leaving no widow or children surviving, but leaving remote heirs.

A. R. A. Thompson was appointed administrator of his estate, collected what was due the estate, and filed a final settlement report, showing a balance of \$571.21 in his hands for distribution, concluding his report with the statement "that the amount shown herein in his hands he pays into court; that the Gammon School of Theology, of Atlanta, Georgia, is claiming the money; that he does not know who is entitled to the money, or who the heirs are, and he therefore pays the same into court for whoever may be entitled to the money."

Among the assets of the estate was a note, dated August 4th, 1887, given by one William J. B. Lather to the decedent for \$700, borrowed money due in three years, which note was collected by the administrator, and constituted a part of the general funds of the estate, of which there remained the balance as stated.

The appellant filed a petition, making the legal heirs par-

The Gammon Theological Seminary v. Robbins *et al.*

ties, alleging facts which it is claimed constituted the appellant the owner of the note for \$700 by gift from the decedent during his life, and asked that it be decreed to be the owner of the fund, and that the clerk be ordered to pay the same to it and its board of trustees.

To this petition appellees demurred, and the demurrer was sustained and exceptions reserved. The appellant refused to plead further, final judgment was rendered on demurrer against the appellant, from which judgment it appeals, and assigns such ruling as error.

The question presented by the demurrer and discussed by counsel is as to whether or not, under the facts alleged, the title to the note, or the proceeds thereof, passed to the appellant by gift from Robbins.

On the 14th day of September, 1887, Robbins executed and delivered to one Rev. James C. Murray, the duly authorized agent of the board of trustees of the plaintiff, a written instrument, of which the following is a copy :

"State of Indiana, Henry County, ss. :

"I, John Robbins, of the county and State aforesaid, hereby give to the trustees of the Gammon School of Theology, situated at the city of Atlanta, State of Georgia, organized (or to be organized) under the laws of the said State of Georgia, and under the control and management of the Freedmen's Aid Society of the Methodist Episcopal Church, the principal of a note for seven hundred dollars (\$700), dated August 4th, 1887, due three years after date, and signed by W. J. B. Lather, in trust for the endowment of a perpetual scholarship in said Gammon School of Theology, to be known as the John Robbins Scholarship ; said sum of seven hundred dollars to be given in trust to the said trustees when the said note falls due, on the 4th day of August, 1890, and to be by them invested according to their best judgment, and the income to be devoted each year to the support of a student in the said Gammon School of Theology, under the direction of the faculty of the same.

The Gammon Theological Seminary v. Robbins *et al.*

"In testimony whereof I have hereunto set my hand and affixed my seal this 14th day of September, in the year of our Lord, one thousand eight hundred and eighty-seven.

his

"JOHN X ROBBINS. [SEAL.]"
mark.

This writing was attested by two witnesses, and acknowledged before a justice of the peace.

The note was retained by Robbins, and never was delivered. The question presented is as to whether or not the execution of this writing perfected the gift and transferred the title to the principal of the note without a delivery of the note.

The universal rule is, that there must be a delivery of the article during the lifetime of the donor to constitute a valid gift *inter vivos*.

In the case of *Smith v. Dorsey*, 38 Ind. 451, this court said: "To constitute a valid gift *inter vivos* it is essential that the article given should be delivered absolutely and unconditionally. The gift must take effect at once and completely, and when it is made perfect and complete by delivery and acceptance, it then becomes irrevocable by the donor. Gifts *inter vivos* have no reference to the future, but go into immediate and absolute effect. A court of equity will not interfere and give effect to a gift that is inchoate and incomplete."

It is contended that this instrument does make an absolute gift and transfer of the promissory note, and it being declared in writing, and the writing being delivered, it operated to pass the title to the property; that a promissory note may be transferred either by an endorsement upon the note or by a separate written instrument.

Admitting this to be true in case of a sale and transfer for value of a promissory note, it has no such application in case of a gift. One may make a valid parol contract for the sale of personal property under fifty dollars in value without de-

The Gammon Theological Seminary v. Robbins *et al.*

livering the property, or the payment of any earnest money, or reducing it to writing, but to constitute a valid gift *inter vivos* of personal property, even though it be under fifty dollars in value, the property must be delivered. In case of a gift the same principle applies whether the property be of great or small value. A party may make a valid sale or gift of a note by delivery without endorsement so as to transfer the equitable title.

If in this case Robbins had endorsed the note on the back to the appellant, and retained the note, the gift would be incomplete; it would lack the element of delivery to make it valid. One can not make a valid gift of a horse or a promissory note by saying, "I give the horse or the note to A." It lacks the element of delivery to make it a valid gift.

The well-settled rule is that there must be a delivery of the property, with an intention to give. Delivery is absolutely necessary to the validity of a gift.

The owner must part with his dominion and control of the article before the gift takes effect; mere words alone convey no title, and a present gift must be intended; the donor must intend to part with the title and control of the thing at the time of making the gift. A gift to take effect in the future is void. While a delivery is absolutely necessary to the validity of a gift, yet it is not necessary that there should always be a manual delivery of the thing given. It will be sufficient if the delivery be as complete as the thing and the circumstances of the parties will permit. If the article given be too bulky to admit of a manual delivery, but there is a surrender of the possession and control by the donor to the donee, with a clear expression of the intention of the donor to give, and the donee accepts the gift, and assumes control of the property, it will be sufficient. In case of a gift of an article of personal property by the father to his child, who is at the time a member of his family, the change of possession need only be such as the circumstances and the nature of the property will permit. The same is true of a gift by the hus-

The Gammon Theological Seminary v. Robbins *et al.*

band to the wife. In the case of a gift by the father to his infant daughter, residing in his family, on the occasion of her birthday, of a piano, which thereafter was used by her and claimed as her own, and recognized by the father and other members of the family, as her property, and afterwards she married, and having no suitable place to keep the piano at her own house she allowed it to remain at her father's, she visiting and remaining at her father's for weeks at a time, it was held that there was such a delivery as passed the title. *Ross v. Draper*, 55 Vermont, 404.

So, in a case where the father declared his intention of giving to his infant child certain cattle, and bought a brand and caused it to be recorded, and branded the cattle in the name of such child, with the avowed purpose of giving them to the child, and turned them out, it was held that it was a sufficient delivery to pass the title. *Hillebrant v. Brewer*, 6 Texas, 45. In these instances the parties made such a delivery of the property as the relations and circumstances of the parties, and the nature of the property, would permit.

The authorities are not uniform as to whether or not, when a present gift of property is expressed in writing, and the writing itself is delivered, it is sufficient without the actual delivery of the thing given. It was held that where a father made a gift by a declaration in writing, in the form of a deed, to his infant child, of promissory notes, and in the writing itself declared himself a trustee to manage the property for the benefit of the donee, and caused the deed to be recorded, and the donor, styling himself trustee, retained the notes, had them assessed to the donee, and paid the taxes, and managed them for his said child, it was a valid gift. *Walker v. Crews*, 73 Ala. 412.

We do not think the facts alleged in the complaint in this case bring it within any of the rules above stated, by which it constitutes a valid gift.

In this case it does not appear that the note drew interest, but the averments in the complaint show it to be a note for

The Gammon Theological Seminary v. Robbins et al.

\$700, due August 4th, 1890. The instrument in writing, signed by Robbins, when taken as a whole, shows it to be a prospective gift of the money for which the note called. The words in the writing relating to and importing a gift are, "I give to the trustees," etc., "the principal of a note for seven hundred dollars, * * * said sum of seven hundred dollars to be given in trust to the said trustees when the said note falls due, on the 4th day of August, 1890, and to be by them invested according to their best judgment."

The presumption of law is, that the note will be paid when due, and the fair construction to be given to the words used is, that it was the intention of the donor to give the money, the principal sum of the note, when the note matured, to the trustees of the college, and it does not warrant a construction that it was intended by the instrument to assign the principal sum of the note itself to the trustees, and authorize them to collect the note, but it is a mere contract to give the money when paid to the trustees, and that they should then invest the money given to them according to their best judgment. While in the forepart of the writing the word "give" is used, yet it is followed by the words "to the trustees of" a school, organized or to be organized. Following later on in the writing it is expressly stated that the sum of seven hundred dollars, not the note for seven hundred dollars, but the sum of seven hundred dollars, is to be given when the note falls due, so that the gift of \$700 is to be made when the note falls due to the trustees of the college at the maturity of the note.

The writing itself constitutes a mere agreement to give a sum in the future. There is nothing in the writing indicating an intention to assign the note or to give to the donees any right to maintain an action for the collection of it.

Whatever may be the correct rule as to the effect of a writing whereby a party expresses an intention to make a present gift, and transfer the immediate title, custody and control of an article of personal property or chose in action,

The Gammon Theological Seminary v. Robbins *et al.*

as a promissory note, when nothing prevents the article or thing given from being actually delivered and handed over from the donor to the donee, as in this case, but no actual delivery being made, can make no difference in this case, for the writing is but an expressed intention or contract to give something in the future, and under such a state of facts the authorities are uniform that no property passes. *Zimmerman v. Streeper*, 75 Pa. St. 147; *Nickerson v. Nickerson*, 28 Md. 327; *Shower v. Pilck*, 4 Exchequer, 478; *Egerton v. Egerton*, 17 N. J. E. 419.

In this case, if Robbins had lived, he alone would have had the right to have collected the note, and it required some further act on his part to have passed the title either of the note or the money to the donee. Had he collected and used the money, the writing having no consideration to support it, it could not have been enforced against him, neither can it be against his estate. If not liable upon the contract, there is no liability for the conversion of the money. If the note or the money actually belonged to the donee, then there would be a liability for the conversion of the money, for if the gift was actually executed then the donor could not revoke it, but it is revocable until executed. Like a promissory note executed by the maker to the payee as a gift, it is but a mere promise to make a gift, and not enforceable. *Williams v. Forbes*, 114 Ill. 167.

In regard to written declarations of gift, Schouler, in his work on Personal Property, vol. 2, section 89, says: "An ordinary writing of gift, not under seal, would, we presume, have the effect in most States, as in England, of a parol declaration of gift, agreeably to the usual statute provisions; and simply furnish more tangible proof than expressions by mere word of mouth that a gift had been perfected, yet nothing conclusive. Parol declarations of gift, without delivery of the chattel, amounted to nothing more at the old law than a promise to give, void for want of consideration; but in some of the later cases written memoranda are found of considerable

Johnson, Trustee, v. Johnson *et al.*

importance in establishing such a declaration of trust as equity would now be disposed to carry into effect out of regard to the mutual intention of donor and donee."

In 1 Parsons Contracts (7th ed.), p. 235, it is said: "It is essential to a gift, that it goes into effect at once, and completely. If it regards the future, it is but a promise; and being a promise without consideration, it can not be enforced, and has no legal validity. Hence delivery is essential to the validity of every gift; for not even a court of equity will interfere to enforce a merely intended or promised gift. There is, it is true, some authority for supposing that a gift *inter vivos* may be valid without delivery, if there be a distinct acceptance. But this is not the law. Nor will transfer by writing alone satisfy the requirement of delivery." See 2 Kent (12th ed.), pp. 438 and 439; *Payne v. Powell*, 5 Bush, 248; Bishop Contracts, section 82; *Green v. Langdon*, 28 Mich. 222; *Smith v. Dorsey*, *supra*; *Smith v. Ferguson*, 90 Ind. 229; *Devol v. Dye*, 123 Ind. 321.

There was no title to the note or the money collected upon the same passed by the writing to the appellant. The court properly sustained the demurrer to the complaint.

There is no error in the record.

Judgment affirmed, with costs.

Filed April 22, 1891.

No. 15,027.

JOHNSON, TRUSTEE, v. JOHNSON ET AL.

WILL.—Construction of.—Joint-Tenancy.—Where it was provided in a will bequeathing all of the testator's personal property to two of his granddaughters, that the property should be held in trust for said children until they became of lawful age, and that if they should die without any children of their own, the property should go to his three sons, naming them, the share of one of the devisees, who died intestate un-

Johnson, Trustee, v. Johnson *et al.*

der the age of twenty-one years, unmarried and without a child or children of her own, passed to the three sons of the testator. There is nothing in the will to indicate that it was the intention of the testator that the survivor should take the whole estate on the death of one of the granddaughters, or that the interest of the deceased granddaughter should descend to her heirs. Under the statutes of Indiana, property held by two or more persons as joint tenants does not go to the survivor, unless it is so expressly stipulated in the instrument creating the estate.

From the Fayette Circuit Court.

J. I. Little and D. W. McKee, for appellant.

CORREY, J.—This was an action brought by the appellant to obtain a construction of the last will of Lawrence Johnson, deceased.

The will in question bequeaths to Edna Dearmond and Ella Dearmond, granddaughters of the deceased by an only daughter, all his personal estate, and appointed the appellant, Othniel Johnson, their uncle, as trustee, to hold and manage their property until they reach the age of twenty-one years. The controversy arises out of the following clause in said will:

“ But to be held in trust for said children until they become of lawful age, and (if) they die with any children of their own their said property shall go to my three sons, John L. Johnson, Othniel Johnson and Lawrence Johnson.”

Edna Dearmond died intestate under the age of twenty-one years, unmarried and without child or children of her own.

The appellant, at the time of her death, had in his hands, as trustee, about the sum of \$2,600. Being in doubt as to whether one-half the sum in his hands belonged to the sons of the deceased or to Ella Dearmond, the sister of Edna, he brought this suit to determine the rights of the parties in interest.

At the request of the appellant the court made a special finding of the facts, from which it appears that Edna and

Johnson, Trustee, v. Johnson *et al.*

Ella Dearmond are the only children of a daughter of the deceased, and that the clause above set out contains a clerical error. Instead of reading "with any children of their own," the clause should read, "*without any children of their own.*"

The court stated, as a conclusion of law, from the facts found, that one-half the sum in the hands of the appellant at the time of the death of Edna Dearmond went to the sons of Lawrence Johnson, deceased, under the terms of the above will.

It is contended by the appellant, who is one of the sons, that in this conclusion the court erred, and that upon the death of Edna Dearmond her interest vested in her sister Ella Dearmond as the survivor.

There is no brief on file for the appellees and we are, for that reason, without information as to their views upon the question presented for our consideration.

It is earnestly contended by the appellant that upon the death of Edna Dearmond her interest in the fund in controversy went to her sister Ella Dearmond by survivorship, and must remain there, unless she shall die without children of her own.

Under the rules of the common law it was important to know whether a devise, or bequest, to two or more persons created a joint estate, or an estate in common, for if the estate was joint, the survivor took the whole; but if the estate was one in common, the whole did not go to the survivor. And the decided weight of authority is, that a devise to two or more persons simply makes the devisees joint tenants, and this is true whether the devise be made to a trustee, or otherwise. 3 Jarman Wills, p. 4, and authorities cited.

The law of Joint Tenancy, however, is now of little importance in the United States, as it has been abrogated by statute in nearly all States in the Union. Among the States converting joint estates into estates in common, or modifying the doctrine of survivorship by statute, are found Geor-

Johnson, Trustee, v. Johnson *et al.*

gia, Ohio, Oregon, Tennessee, Alabama, Arkansas, Colorado, Illinois, Florida, North Carolina, Pennsylvania, South Carolina, Texas, Virginia, West Virginia, and Kentucky. Freeman Co-Tenancy and Partition, section 35.

In the case of *Whittlesey v. Fuller*, 11 Conn. 337, the Supreme Court of Connecticut denounced the doctrine of survivorship as odious and unjust, and without any statute upon the subject refused to enforce it. Indeed, the courts, both in England and this country, have long regarded the doctrine of survivorship with disfavor, and have not enforced it except in plain cases where there was no legal means of escape. Freeman Co-Tenancy and Partition, *supra*.

Our statute upon the subject now under consideration, section 6060, R. S. 1881, is as follows: "The survivor of persons holding personal property in joint tenancy shall have the same rights only as the survivor of tenants in common, unless otherwise expressed in the instrument."

Under this statute, property held by two or more persons as joint tenants does not go to the survivor, unless it is so expressly stipulated in the instrument creating the estate. As there is no provision in the will now under investigation which indicates an intention on the part of the testator that the survivor should take the whole estate on the death of one of his granddaughters, we are of the opinion that Ella Dearmond did not take the interest of her sister, upon her death, as the survivor.

Nor do we think such interest descended to the heirs of Edna Dearmond upon her death. It was the intention of the testator, we think, that his sons named in the will should take her interest in the event she should die without children of her own. Of course it was impossible that the two granddaughters of the testator should jointly have children of their own, and as there is no provision for either to take from the other as survivor, the only reasonable construction of the will is, that it was his intention if either should die

Miller, Adm'r, v. The Louisville, New Albany and Chicago Railway Co.

without children, the interest of the one so dying should vest in the three sons named in the will.

In our opinion, the circuit court did not err in its conclusions of law.

Judgment affirmed.

Filed April 22, 1891.

128	97
130	143
128	97
139	361
128	97
146	606
128	97
150	525

No. 14,755.

MILLER, ADMINISTRATOR, v. THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

NEGLIGENCE.—*Contributory Negligence.*—The negligence of the driver of a wagon can not be imputed to one who is riding in the wagon with him, but the latter can not recover unless it affirmatively appears that he was free from contributory negligence.

RAILROAD.—*Accident at Crossing.*—*Contributory Negligence.*—Where a wife was riding in a wagon with her husband who was driving, and they approached a railroad crossing, known by the wife to be dangerous, when a train was coming up in full view, and the husband stopped the team, but immediately afterwards attempted to cross in front of the train and both were killed, the wife in failing to warn the husband or to look or listen for approaching trains was guilty of contributory negligence, and there can be no recovery for her death.

SAME.—*Photograph as Evidence.*—It was not error to permit a witness to testify that a photograph introduced in evidence was a correct representation of the crossing and surroundings where the accident occurred.

JUROR.—*Relationship to Counsel.*—*Setting Aside Verdict.*—A verdict will not be set aside because a juror was permitted to serve who was the husband of a niece of the wife of one of the defendant's attorneys.

From the Carroll Circuit Court.

J. R. Coffroth, T. A. Stuart, F. Gaylord and J. F. McHugh, for appellant.

W. S. Kinnan, E. C. Field and C. C. Matson, for appellee.

ELLIOTT, J.—The facts, as they appear in the special ver-

VOL. 128.—7

Miller, Adm'r, v. The Louisville, New Albany and Chicago Railway Co.

dict, are, in substance, these: The track of the appellee crosses a public highway not far from the city of Lafayette. The railroad runs from north to south, and the highway from east to west, but neither runs on a direct line. The track approaches the crossing from the west on a descending grade of about sixty feet to the mile, and the grade of the highway from the south descends to the crossing at about two hundred and fifty feet per mile. On the south side of the railroad, and extending from a point one-half mile west of the crossing to a distance of two hundred and seventy feet of the crossing, there is a hill thirty feet high. A side-track extends along the main track from a point seventeen rods west of the crossing eastward, and beyond the highway. On the 26th day of June, 1886, there were five freight cars, each thirty feet in length, standing on the side-track; one of these cars was a box-car, ten feet high, and the others were platform cars. Beginning at a point in the public highway fifty feet distant in a southeasterly direction from the railroad, was an open space where the track was plainly visible to one travelling on the highway for more than one-fourth of a mile. The crossing was a dangerous one, and the appellant's intestate and her husband passed over it as often as once in every two weeks, and knew that the crossing was a dangerous one. On the 26th day of June, 1886, the intestate was riding with her husband along the highway, and at the time they reached a point within one hundred and fifty feet of the crossing a train was approaching from the west, and was in plain view all the time for a distance westward on the track for more than one-fourth of a mile, but the view of the railroad track was partially obstructed by the freight cars on the side-track. The intestate and her husband were riding in an ordinary farm-wagon, drawn by two horses; the husband drove and managed the team. The whistle was not sounded until the train was within seventy rods of the crossing, nor was the bell rung until after the whistle was sounded. The engineer saw the intestate and her husband when within two hundred

Miller, Adm'r, v. The Louisville, New Albany and Chicago Railway Co.

feet of the crossing and sounded the danger signal ; but the husband, although he endeavored to urge his horses across the track, failed to succeed in clearing it, and the wagon was struck by the locomotive, and both the husband and his wife were killed. At a point in the highway about one hundred feet from the crossing the intestate's husband apparently checked his horses ; the train was then in full view, and the engineer seeing the act of the husband was induced to believe that he was going to wait until the train had passed the crossing. The intestate was "not prevented in any manner, or in any way restrained from looking or listening for an approaching train," and nothing was done by her to warn her husband, nor did she look or listen.

It is quite clear that the husband of the appellant's intestate was guilty of contributory negligence. It is evident from the facts stated in the special verdict that the slightest care on his part would have enabled him to see and avoid the approaching train. But the fact that the driver of a wagon and team which collides with a railroad train is negligent does not necessarily preclude a recovery by one riding in the wagon with such negligent driver. The doctrine of *Thorogood v. Bryan*, 8 C. B. 115, has never been sanctioned by this court. *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186, and cases cited ; *Town of Knightstown v. Musgrove*, 116 Ind. 121 ; *City of Michigan City v. Boeckling*, 122 Ind. 39. The doctrine has, indeed, been overthrown in England and is repudiated by almost all of the courts of this country. See authorities cited in notes, pp. 630, 632, Elliott Roads and Streets. Rejecting, as we do, the doctrine of imputed negligence, we are, nevertheless, required to hold that there can be no recovery in this action. We are led to this conclusion by the fact that the intestate was not shown to be free from contributory negligence. It has long been the settled law of this State that a plaintiff can not recover in such a case as this unless it affirmatively appears that his own negligence did not proximately contribute to his injury. *Hathaway v.*

Miller, Adm'r, v. The Louisville, New Albany and Chicago Railway Co.

Toledo, etc., R. W. Co., 46 Ind. 25; *Toledo, etc., R. W. Co. v. Brannagan*, 75 Ind. 490; *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31; *Indiana, etc., R. W. Co. v. Greene*, 106 Ind. 279; *Cones v. Cincinnati, etc., R. W. Co.*, 114 Ind. 328; *Ohio, etc., R. W. Co. v. Hill*, 117 Ind. 56; *Chicago, etc., R. W. Co. v. Hedges*, 118 Ind. 5; *Mann v. Belt R. R., etc., Co.*, post, p. 138.

The fact that there was no contributory negligence may undoubtedly be inferred from circumstances, but to authorize such an inference there must be evidence of circumstances from which the inference can be legitimately drawn. There are no circumstances in this instance authorizing such an inference. The intestate approached a crossing known to her to be dangerous, and approached it when a train was in full view; she took no precautions to warn her husband or to avert the threatened danger, although slight care might have avoided it. While the husband's negligence is not to be imputed to her, she was, nevertheless, under a duty to herself to exercise ordinary care. The rule we adopt is laid down in the well-reasoned case of *Brickell v. New York, etc., R. R. Co.*, 120 N. Y. 290.

In the case of *Hoag v. New York Central R. R. Co.*, 111 N. Y. 199, it was said, in speaking of a case where the wife was seated in a wagon drawn by a team which her husband was driving, that, "If they did not see it (the train), or, at least, the deceased did not see it, she was negligent, for she was bound to look and listen, and the facts show that if she had looked, she could have seen, and would have seen, the approaching train. She had no right, because her husband was driving, to omit some reasonable and prudent care to see for herself that the crossing was safe." The statement was approved in the later case. This statement applies with great force to the case before us, for here the wagon was stopped, the engineer had reason to believe the husband did not intend to attempt to cross in front of the train, there was no obstruction to the view, and the wife knew that the

Miller, Adm'r, v. The Louisville, New Albany and Chicago Railway Co.

crossing was an unusually dangerous one. Under such circumstances she was certainly bound to use her sense of sight and hearing, and to warn her husband by word or act. In the case of *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514 (15 Am. St. R. 733), the same general doctrine is declared, and it is carried somewhat further than we think is warranted by principle or authority. If it affirmatively appeared in this case that no want of care was attributable to the deceased, we should hold that the fact that the negligence of the husband concurred with that of the railroad company in producing the injury, would not bar a recovery, for we understand the law to be well settled that, although the negligence of a third person concurs in producing an injury, still the plaintiff, if free from fault, may recover (*Rogers v. Leyden*, 127 Ind. 50, and cases cited), but here the plaintiff was not free from contributory fault. There is in our own reports a recent case that we must overrule if we give judgment in favor of the appellant. We refer to the case of *Cincinnati, etc., R. W. Co. v. Howard*, 124 Ind. 280. In that case a daughter was riding in a buggy drawn by a horse driven by her father, and it was held that the trial court erred in refusing to give an instruction reading thus: "The burden is on the plaintiff to show, by a preponderance of the evidence, that she and her father vigilantly used their eyes and ears to ascertain if a train of cars was approaching, and if this has not been shown to you by a preponderance of the evidence, the plaintiff can not recover." This is an unequivocal assertion of the rule we have stated, and we can not, in view of the authorities, declare that the decision, in the case cited, is not the law; on the contrary, we think it correctly states the law upon the point under consideration. It is true that some of the expressions found in the opinion are opposed by earlier as well as later cases, and such expressions must be deemed erroneous, but they do not bear upon this point.

We do not undertake to lay down a general rule which shall apply to all cases of this class; we simply adjudge that,

Miller, Adm'r, v. The Louisville, New Albany and Chicago Railway Co.

upon the facts stated in the special verdict, it can not be assumed that there was no contributory negligence on the part of the deceased, or that there was any fact excusing her failure to exercise such care and vigilance as the law requires.

The other questions in the case arise on the motion denying a new trial.

There was no error in permitting a witness to testify that a photograph introduced in evidence was a correct representation of the crossing and its surroundings. *Keyes v. State*, 122 Ind. 527.

A witness for the appellee was permitted to state what was said by him, at the time the whistle was sounded, to a lady passenger on the train with him. We need not and do not decide whether this evidence was competent for the purpose of enabling the witness to fix the time when he heard the whistle, for, granting that it was incompetent, still there can be no reversal of the judgment, inasmuch as the jury found for the appellant upon the question to which the evidence was directed, and hence it is obvious that if there was error it was harmless.

Appellant asks a reversal upon the ground that the appellee knowingly permitted a juror to serve who was the husband of a niece of the wife of one of the appellee's attorneys. The contention of appellant can not be sustained. Such a relationship of a juror to one of the counsel can not, under the long existing rule, be deemed cause for setting aside a verdict. *Thompson and Merriam Juries*, 181.

Judgment affirmed.

Filed April 21, 1891.

Horton *et al.* v. Hastings.

No. 14,740.

HORTON ET AL. v. HASTINGS.

GUARDIAN AND WARD.—*Setting Aside Guardian's Report.*—In the absence of a statute providing for the setting aside of the final reports of guardians, such actions fall within the provisions of the act concerning the settlement of decedents' estates.

SAME.—*Action Against Guardian.*—*Administrator's Discharge.*—The approval of the final settlement and discharge of the administrator precludes the bringing of an action against the guardian, either upon his bond, or to set aside his report.

VENIRE DE NOVO.—*When will be Awarded.*—A *venire de novo* will be awarded only where the special findings are defective in form.

From the Hancock Circuit Court.

A. L. Ogg, for appellants.

J. A. New and C. G. Offutt, for appellee.

MILLER, J.—The appellants brought this action against the appellee to set aside his final report as guardian of Emma Bell Horton.

It appears from the complaint that Emma Bell Horton died, during her minority, leaving the appellant John Horton, her husband, and Laura Collins, a daughter, as her only heirs at law. Upon the death of his ward, the appellee made a report of his trust to the proper court, and his report was approved, and he was finally discharged. On the day of the filing of the report, letters of administration on the estate issued to one Josephus Bills, who entered upon the discharge of his duties as such administrator, made an inventory of the estate, including therein the claims turned over to him by the appellee as her former guardian; after due administration of the estate the administrator made a final report, and was discharged.

The answers filed were: 1. A general denial. 2d. That the cause of action did not accrue within three years; and, 3d. That the cause of action did not accrue within six years.

128	103
131	115
128	103
146	628
147	582
128	103
155	69

Horton *et al.* v. Hastings.

Demurrers were overruled, severally, to the second and third paragraphs of answer, and exceptions saved.

The cause was tried by the court, and, at the request of the plaintiff, a special finding of facts and conclusions of law returned.

In the absence of a statute providing for the setting aside of the final reports of guardians, such actions are held to fall within the provisions of the act concerning the settlement of decedents' estates. *Briscoe v. Johnson*, 73 Ind. 573.

By section 2403, R. S. 1881, it is provided that final settlements may be set aside within three years, and that persons interested in the estate, who are under legal disabilities, may file their petitions therefor within three years from the time of the removal, or cessation, of such disability.

The petition to set aside the final report of the appellee as such guardian was filed more than seven years after its approval, and, as the appellant John Horton is not shown to have been under legal disabilities during any portion of that time, as to him the application is clearly barred.

The personal estate belonging to Emma Bell Horton, at her death, went, by operation of law, to her administrator, from whom, and under whom, the ward of the appellant Rosecrans L. Ogg received title. It was the duty of such administrator to fully administer the estate, and if a cause of action existed against the former guardian of his intestate it was his duty to prosecute the same, and to collect all claims and demands, of every nature, due the estate.

The approval of the final settlement and discharge of the administrator precludes the bringing of an action against the guardian, either upon his bond, or to set aside his report. *Carver v. Lewis*, 104 Ind. 438; *Carver v. Lewis*, 105 Ind. 44; *In re Wood*, 71 Mo. 623.

It follows that the cause of action having accrued to the administrator of Emma Bell Horton, under whom the ward of the appellant Ogg claims title, more than six years before the bringing of this suit, the action is barred, and the court

The Terre Haute and Logansport Railroad Company v. Soice, Treasurer.

did not err in overruling the demurrers to the second and third paragraphs of answer ; or in its conclusions of law.

The special findings cover all the questions in the case, are plain and concise in statement, and therefore the court did not err in overruling the motion of appellant Ogg for a *venire de novo*.

The evidence is not in the record, and no question is made in the argument upon the action of the court in overruling the motion for a new trial.

Judgment affirmed.

Filed April 21, 1891.

No. 14,957.

128	105
145	128

THE TERRE HAUTE AND LOGANSPORT RAILROAD COMPANY v. SOICE, TREASURER.

DRAINAGE.—Cleaning Out Ditch.—Assessment by County Surveyor.—Collection of.—Action to Enjoin.—When Injunction will Lie.—Proper Remedy.—Appeal.—Under the act of April 6th, 1885 (Acts 1885, p. 141), investing the county surveyor with the power to clean out ditches, and restore them to their original dimensions, and to assess the costs against the lands originally assessed for the construction of the ditch, etc., and providing for an appeal from the decision of the surveyor by any party aggrieved, an action will not lie to enjoin the collection of an assessment made by the county surveyor, unless it be affirmatively shown that the acts of the surveyor are not merely erroneous, but absolutely void, and without any authority. The surveyor being invested by statute with power to make the repairs and assessments, the only remedy of persons aggrieved by reason of an erroneous assessment is by appeal, and the assessment can not be attacked collaterally in a proceeding for injunction.

SAME.—When Injunction will not Lie.—Complaint.—Demurrer.—Where it does not appear in the complaint in an action to enjoin the collection of an assessment made by the county surveyor under the above section, that the amount is not assessed against the particular property owned by the plaintiff which is liable for the payment of such assessment, nor that the defendant will collect or attempt to collect the same by

The Terre Haute and Logansport Railroad Company v. Soice, Treasurer.

distress and sale of any other property of the appellant, the complaint is bad on demurrer.

From the Marshall Circuit Court.

J. G. Williams, for appellant.

A. C. Capron, for appellee.

OLDS, C. J.—This was an action brought by the appellant against the appellee to enjoin the collection of an assessment made by the county surveyor of Marshall county against the appellant for cleaning out a ditch theretofore constructed under the law.

The complaint alleges that the appellant company, in constructing its railroad through said county along the right of way conveyed to it, found it necessary to cross a certain ditch theretofore constructed by order of the board of commissioners of said Marshall county and the circuit court of said county; that its line of road upon its right of way had crossed said ditch some three times; and that they filled up said ditch where it crossed its railroad at some of the points, and restored the same to its full size, dimensions, and usefulness, by constructing it along its right of way a certain distance. It is further alleged that the surveyor cleaned out said ditch and assessed the expense therefor against the lands originally assessed for the construction thereof; that the surveyor found that the ditch was filled up and obstructed by the act or negligence of an employee or contractor of the appellant, and assessed \$25 against the appellant for such obstruction, and made another assessment against the appellant of \$34 for delivering and laying tile through the ground of appellant's road where it crosses the ditch; that appellant failed to pay the assessments, and said surveyor made and filed with the auditor of said county of Marshall a certified copy of said assessment, and said auditor placed the same upon the tax duplicate of said county; that the appellee is the treasurer of said county, and has demanded payment from appellant, and, unless enjoined, will proceed to collect

The Terre Haute and Logansport Railroad Company v. Soice, Treasurer.

the same by distress and sale of the property of this plaintiff; that said amount has been carried forward as delinquent, etc.

Prayer for an injunction.

A demurrer was sustained to the complaint and judgment rendered for appellee. The only error assigned relates to the ruling of the court in sustaining the demurrer.

It is contended by the appellant that under the statute, 5th subdivision of section 3903, R. S. 1881, it had the right, in the construction of its railroad, to cross said ditch, and had the right to change its course, and do the acts which it did in this instance if, in doing so, it did not unnecessarily impair the usefulness of the ditch, or restored it to its original usefulness, which it avers in the complaint it did in relation to the ditch in controversy. Railroad companies, no doubt, have the right to construct their roads across public ditches without liability, if they restore them to their original state and usefulness, without incurring any liability.

It is further contended that a portion of the assessment made against the appellant in this case was for tiling and putting in a tile ditch where the original specifications call for an open ditch, and therefore the surveyor had no right to put in a tile ditch across their right of way and through the grade of their railroad.

It is not necessary to pass upon this question, for the reason that the action is to enjoin the whole amount of the assessment, and a portion of the assessment is made on account of the ditch having been obstructed and filled up by the appellant, as found by the surveyor. Section 10 of the drainage act of 1885, Elliott's Supp., section 1193, authorizes the county surveyor to clean out ditches and restore them to their original dimensions, and to assess the costs against the lands originally assessed for the construction of the ditch. It provides further "that if such repairs shall have been rendered necessary by the act or negligence of the owner or occupant or employee or agent of either, or any of the

The Terre Haute and Logansport Railroad Company v. Soice, Treasurer.

lands, * * then the cost thereof should be assessed against such lands alone." It further provides for an appeal being taken from the county surveyor by any party aggrieved.

As will be seen, this section invests the surveyor with the power of determining, among other things, the fact as to whether the ditch has been filled up or obstructed, and said repairs made necessary by the act or negligence of any of the land-owners or their agents or employees. It is averred in the complaint that this assessment is made against the appellant, and is collectible by distress and sale of any of its property, real and personal, but there is no complete copy of the record of the assessment made by the surveyor set out. It is not averred but that the appellant is the owner of some part of the lands originally assessed for the construction of the ditch, but it does appear that certain lands along the ditch have been conveyed to the appellant. Nor does it affirmatively appear but that the assessment, as made by the surveyor, is against the lands so assessed for the original construction of the ditch, and now owned by the appellant.

The surveyor having the right and being vested with the discretion of determining the necessity for making the repairs and charged with the duty of certifying the cost to the proper county auditor, and assessing the costs of such repairs against the lands originally assessed for the construction of the ditch, and when any particular owner or occupant of lands has, by his acts or negligence, rendered the repairs necessary, it is made his duty to assess such costs against the particular lands so owned by such person, and it gives a remedy to persons aggrieved by appeal. Such persons are confined to their remedy by appeal, and can not have an injunction to enjoin the collection of such assessment, unless it be affirmatively shown that the acts of the surveyor are not merely erroneous, but absolutely void and without any authority. The surveyor being vested by the statute with power to make the repairs and assessments,

The Terre Haute and Logansport Railroad Company v. Soice, Treasurer.

the remedy of persons aggrieved by reason of an erroneous assessment is by appeal, and the assessments can not be attacked collaterally in a proceeding for injunction.

It is not necessary for us to hold in this case that if the surveyor should not make an assessment against the lands originally assessed, but should simply enter up a personal charge or judgment against the owner, it could not be enjoined, for we do not construe the complaint as alleging any such state of facts; but if the appellant is not liable for obstructing the ditch by filling it up and changing the course of it on account of its right under the statute authorizing it to construct its road across water-courses, provided it restore them to their original usefulness, the right to make such defence is given to it in the original proceedings by an appeal from the judgment of the surveyor.

It is true it is alleged in the complaint that, unless defendant be enjoined, he will proceed to collect the same by distress and sale of the property of the appellant, but it does not appear that the amount is not assessed against the particular property owned by the appellant, which is liable for the payment of such assessment, nor does it appear that the appellee will collect or attempt to collect the same by distress and sale of any other property of the appellee.

Construing the complaint as we think it should be, there are no such facts alleged as entitle the appellant to an injunction enjoining the collection of the assessment, and there was no error in sustaining of the demurrer to it.

Judgment affirmed, with costs.

Filed April 11, 1891.

No. 13,476.

FALLEY v. GRIBLING.

128	110
141	325
128	110
154	161
128	110
159	516

DECEDENTS' ESTATES.—*Insufficiency of Personal Assets.*—*Payment of Indebtedness by Purchase of Part of Real Estate.*—*Right of Contribution.*—A purchaser of land set off to one of the children of a decedent in a partition proceeding, who, in order to prevent the land so purchased by him from being sold to discharge outstanding claims against the estate, pays off such indebtedness, the executor not having any assets with which to do so, is entitled to contribution from one who has also purchased a portion of said estate, but who refuses to pay his proportion of said indebtedness.

SAME.—*Expenses of Administration.*—*Real Estate of Decedent Liable for.*—Under our statute, the land of a decedent is subject to be sold by an executor or administrator to make assets with which to pay the expenses of administration.

SAME.—*Statute of Limitations.*—*Application to Sell Land to Pay Debts.*—*When Must be Filed.*—The fifteen years' statute of limitations applies to applications of an executor or administrator to sell lands for the purpose of making assets with which to discharge the liabilities of the estate represented by him. The statute does not begin to run, however, until the executor or administrator discovers the insufficiency of the personal estate, and that it is necessary to sell land to make assets to pay off such liabilities.

SAME.—*Statute of Limitations.*—*Defence of.*—*How Pleaded.*—*Demurrer.*—*Complaint.*—In an action by an executor to sell land of a decedent for the purpose of discharging liabilities against his estate, a demurrer will not lie to the complaint on the ground that the action is barred by the statute of limitations, unless the complaint affirmatively shows that such is the fact. The statute of limitations must be pleaded, and is not available on demurrer unless it affirmatively appears that the case is not within any of the exceptions to the statute.

PLEADING.—*Sufficiency of Complaint.*—*Motion to Make More Specific.*—In the absence of a motion to make more specific, a complaint sufficiently alleges a conveyance of land to the plaintiff which avers that the plaintiff "purchased" the same.

PRACTICE.—*Uncertainty in Complaint.*—*How Reached.*—*Demurrer.*—A demurrer will not lie to a complaint for uncertainty. The remedy is by motion to make the complaint more specific.

SUPREME COURT.—*Absence of Objection Below.*—*Effect of on Appeal.*—The Supreme Court will not reverse rulings of the circuit court to which no objection was made and no exception reserved, and rulings which the court below had no opportunity to correct.

Falley v. Gribbling.

From the Tippecanoe Circuit Court.

R. P. Davidson and *J. C. Davidson*, for appellant.

W. C. L. Taylor, for appellee.

COFFEY, J.—This was an action by the appellee against appellant and seven other persons, commenced in the Tippecanoe Circuit Court. Judgment was rendered against the appellant by default. No application was made to set aside the default, nor to modify the judgment. It is not disputed that the circuit court had jurisdiction of the subject-matter of the suit, and of the person of the appellant. It is apparent, therefore, that the only question before us relates to the sufficiency of the complaint in the cause. We can not undertake to review rulings of the circuit court to which no objection was made and no exception reserved, and rulings which the court below had no opportunity to correct. *Wilcox v. Monday*, 83 Ind. 335.

The complaint in the cause is lengthy, but the material facts alleged are that John Taylor died testate, in Tippecanoe county, in the year 1865, leaving, as his legatees and heirs at law, Emma L. Taylor, his widow; Susan B. Taylor, Marshall B. Taylor, William C. L. Taylor, Charles B. Taylor, Henry S. Taylor, Frederick D. Taylor and Grace J. Taylor, his children. William A. Potter qualified as executor of the will of the said John Taylor, and took upon himself the duties of the trust. Before the settlement of said estate a portion of the land devised by the will was partitioned among the several children of John Taylor, above named. On the 21st day of January, 1876, and after the partition of said land, the executor made a report to the common pleas court of Tippecanoe county, in which he stated that the outstanding claims against said estate amounted to the sum of \$799.12, and showing that he was without assets to pay the same. At the time of the filing of this report a large portion of the land set off in the partition proceeding, to the heirs and legatees of John Taylor, had

Falley v. Gribbling.

passed into the hands of third parties, among whom were the appellant and the appellee in this case. At the April term of the circuit court, 1881, said executor filed a petition to sell that portion of the land set off to William C. L. Taylor to make assets with which to pay said indebtedness, to which petition the appellee was made a party, he, at that time, owning an interest in that portion of the land.

At the request of the executor, the court made a special finding of the facts, from which it appears that the court found that the land was liable to be sold to make assets for the payment of the debts due from said estate. The indebtedness consisted of a balance due the executor, balance due for attorney's fees, unpaid costs accrued, and estimated costs to accrue on the final settlement. The complaint alleges that the appellee, in order to save his land from sale under this proceeding, was compelled to and did pay said indebtedness, amounting to the sum of \$714.49. The parties owning the different shares of said land have all paid their proportion of the sum necessary to pay said claims, except the defendants to this action, to whom the shares allotted to Marshall B. Taylor, Frederick D. Taylor and Henry S. Taylor have been conveyed. Before the commencement of this suit the appellee demanded of the appellant his proportion of the amount paid to discharge the liabilities against the estate of John Taylor, deceased, but he refused to pay the same. The complaint prays for a finding as to the amount due from the appellant, and that the same be declared a lien on the land owned and held by him which formerly belonged to the estate of John Taylor.

Many objections are urged to this complaint which go to the question of its uncertainty. It must be confessed that the complaint before us is not a model pleading, but it has been so often decided that a demurrer is not the remedy for uncertainty that the rule is quite familiar to the profession. The remedy for uncertainty is by motion to make more specific. If uncertainty can not be reached by demurrer, it certainly

Falley v. Gribbling.

can not be reached, in this court, by an assignment of error calling in question the sufficiency of the complaint.

The complaint under consideration proceeds upon the theory that the appellee, by the payment of the claim therein named, discharged a common burden which rested alike upon his land and the land of the appellant, and that by reason of the discharge of such burden, he is entitled to contribution from the appellant.

The material questions in the case, therefore, are, does it appear from this complaint :

First. That the appellant and the appellee each owned land which was inherited by the heirs of John Taylor, deceased, or that had been devised to them by his last will?

Second. Was such land liable to be sold for the payment of the claims described in the complaint? and

Third. Did the appellee pay the whole of said claim?

Where one discharges a lien which rests alike upon the property of himself and others, he is entitled to contribution from those whose property has been thus relieved from the common burden. *Cook v. Cook*, 92 Ind. 398; *Taylor v. Taylor*, 8 B. Mon. 419; *City of New Orleans v. City of Baltimore*, 15 La. 625.

"The doctrine of contribution, in such cases, rests on the principle, that where parties stand in *æquali jure*, equality of burthen becomes equity." 4 Kent Com. 371.

It sufficiently appears that the appellee paid the claims mentioned in his complaint.

It is contended, however, by the appellant, that the executor could not sell the land to make assets for the payment of the claims set out in the complaint, as they were the expenses of administration, and were not debts which constituted a lien upon the land of John Taylor, deceased.

At common law the land of a deceased person was not, ordinarily, assets to pay personal debts.

As to whether the land of a decedent, descending to his

VOL. 128.—8

Falley v. Gribbling.

heirs, or bequeathed to them or to others, is subject to sale by the executor or administrator to pay the costs of administration, necessarily depends upon the statutes of the State where the application is made. It is held in the States of Alabama, Illinois, Massachusetts, Mississippi, Missouri, New York, Pennsylvania, and, perhaps, other States, that the land of a deceased is not subject to sale for the payment of the expenses incurred in the settlement of an estate. *Owens v. Childs*, 58 Ala. 113; *Fitzgerald v. Glancy*, 49 Ill. 465; *Walker v. Diehl*, 79 Ill. 473; *Dubois v. McLean*, 4 McLean, 486; *Dean v. Dean*, 3 Mass. 258; *Moore v. Ware*, 51 Miss. 206; *Farrar v. Dean*, 24 Mo. 16; *Filch v. Wilbeck*, 2 Barb. Ch. 161; *Grice's Estate*, 11 Phila. 107.

On the other hand, it is held in the States of New Jersey, California, Maine, Indiana, and other States, that the land of a decedent is subject to be sold by an executor or administrator to make assets with which to pay the expenses of administration. *Personette v. Johnson*, 40 N. J. Eq. 173; *Stevens v. Burgess*, 61 Maine, 89; *Griffith v. Frederick County Bank*, 6 G. & J. 424; *Abila v. Burnett*, 33 Cal. 658; *Dunning v. Driver*, 25 Ind. 269.

Section 2332, R. S. 1881, provides, "If the personal estate of a decedent shall be insufficient for the payment of the liabilities thereof, the real estate of the deceased, if any, shall be sold to make assets for the payment of such liabilities."

Section 2378, R. S. 1881, provides that, unless otherwise provided, the debts and liabilities of a decedent shall be paid in the order therein named, and makes the expenses of administration the first in order of the liabilities to be discharged.

It can not be successfully maintained that the estate of a decedent in this State is not liable for the payment of the expenses of administration. If such expenses constitute a liability against the estate, then our statute expressly pro-

Falley v. Gribling.

vides for the sale of the land owned by the deceased at the time of his death to make assets for its payment.

In the case of *Dunning v. Driver, supra*, it was said by this court: "A large amount of costs had accrued in the administration, and the liability of the estate therefor was not questioned in the evidence. In the absence of personal estate, the land was subject to be made assets for their payment."

Following what we understand to be the true intent and meaning of our statute upon the subject, and the case of *Dunning v. Driver, supra*, we are constrained to hold that land in this State is subject to be sold by an executor or administrator to make assets with which to pay the expenses of administration.

Again it is objected that it does not appear from the complaint in this case that the appellee was the owner of any portion of the land owned by John Taylor at the time of his death, when he paid the claim described, or that the appellant was the owner of any portion of such land by conveyance from the heirs or legatees.

Upon these subjects the complaint is uncertain and indefinite, and a motion to compel the appellee to make it more specific would have been sustained, no doubt, had such a motion been made.

It is alleged in the complaint that the appellee "purchased" one of the shares set off in the partition proceeding, which allegation is followed by a particular description of the land purchased, but there is no direct allegation that the land had been conveyed.

The word "purchase" is defined to be a term which includes every mode of acquiring an estate known to the law, except that by which an heir, on the death of his ancestor, becomes substituted in his place, as owner, by operation of law. 2 Washburn Real Prop. 401.

One mode of acquiring real property by purchase is by deed. Cruise Dig. Tit. 30, sections 1-4.

Falley v. Gribbling.

Webster defines "purchase" to be the act of obtaining or acquiring title to lands and tenements by money, deed, gift or any means, except by descent.

In the absence of a motion to make the complaint more specific, we think it should be held that it sufficiently appears that the appellee owned an interest in the land subject to be sold by the executor, at the time he paid the claim for the payment of which he is now seeking contribution.

It is directly alleged that the appellant owned an interest in the land at the time the claim was paid by the appellee.

As the land was owned by John Taylor at the time of his death and was set off to one of his heirs in the partition proceeding, the legal presumption is that he acquired title through the heir to whom it was partitioned.

If he acquired a paramount title, that was matter of defence.

Finally, it is urged that the right of the executor to sell the land for the payment of this claim was barred by the statute of limitations at the time of its payment by the appellee.

The statute of limitations must be pleaded and is not available on demurrer, unless it affirmatively appears that the case is not within any of the exceptions to the statute; and a demurrer raises no question under the statute of limitations, where the pleading demurred to does not show affirmatively that the case is not within any of the exceptions to the statute. *Devor v. Rerick*, 87 Ind. 337; *Thompson v. Parker*, 83 Ind. 96; *Wilson v. Ensworth*, 85 Ind. 399; *Lucas v. Labertue*, 88 Ind. 277; *State, ex rel., v. Younts*, 89 Ind. 313; *Hogan v. Robinson*, 94 Ind. 138.

The same rule should be applied in a case like this where the sufficiency of the complaint is called in question for the first time by an assignment of error.

The fifteen years' statute of limitations applies to applications of an administrator to sell land for the purpose of

Falley v. Gribling.

making assets to pay the liabilities of the estate represented by him. *Scherer v. Ingerman*, 110 Ind. 428.

This case seems to be decisive of the question now under consideration. It is held, in this case, that the statute of limitations does not begin to run until the executor or administrator discovers the insufficiency of the personal estate, and that it is necessary to sell land to make assets for the payment of the liabilities against the estate.

It does not appear from the complaint before us when the claim paid by the appellee accrued, nor does it appear at what time the executor discovered that the personal estate was not sufficient to pay all the liabilities against John Taylor's estate. It does not appear by the complaint, therefore, that the right of the executor to sell land to make assets for the payment of the expenses of administration was barred at the time the appellee paid the claim for such expenses.

No question as to the amount to be recovered by the appellee properly arises on this record. If it appears that he is entitled to any amount, the complaint states a cause of action.

Our final conclusion, after a careful consideration of all the questions presented and argued, is, that the complaint before us states a cause of action in favor of the appellee against the appellant.

Many other questions are presented and argued by counsel for the appellant, in an able brief, involving matters not pertaining to the sufficiency of the complaint, but as we have seen, no question is before us other than the question as to whether the complaint states a cause of action.

We find no error in the record for which the judgment of the circuit court should be reversed.

Judgment affirmed.

Filed Feb. 7, 1891; petition for a rehearing overruled April 23, 1891.

No. 14,914.

ELLIS v. BASSETT.

128	118
139	255
128	118
146	254
128	118
149	217
149	218
149	220
128	118
154	571

EASEMENT.—*Way of Necessity.*—The owner of a twenty-acre tract of land, bounded on the north by a public highway, the only highway adjoining his land, used as a roadway a strip of ground along the east side of the tract to reach the public highway on the north. The owner died, and, upon partition, five acres on the north end of the twenty-acre tract were set off to his widow, and the remaining fifteen acres sold to the plaintiff. The widow sold the five acres to the defendant, who denied the right of the plaintiff to use the same in passing from his land to the public highway.

Held, that the plaintiff was entitled to an easement over the defendant's land.

SAME.—*Partition Among Heirs.*—A partition of real estate among heirs carries with it, by implication, the same right of way from one part to and over the other as had been plainly and obviously enjoyed by the common ancestor, in so far as it is reasonably necessary for the enjoyment of each part.

SAME.—Where the owner of an estate imposes upon one part an apparent and obvious servitude in favor of another, and at the time of the severance of ownership such servitude is in use, and is reasonably necessary for the fair enjoyment of the other, then, whether the severance is by voluntary alienation or by judicial proceedings, the use is continued by operation of law.

SAME.—*Notice to Purchaser.*—Where the facts show that the way was a way of necessity, that it was open and visible, and had been used continuously for many years, this constitutes sufficient notice to a purchaser of the existence of the easement.

From the Howard Circuit Court.

J. W. Cooper, B. F. Harness, J. O'Brien and C. C. Shirley, for appellant.

J. C. Blacklidge, W. E. Blacklidge and B. C. Moon, for appellee.

MILLER, J.—The appellee sued the appellant to quiet his title to an easement along and over the land of the appellant.

A demurrer was overruled to the complaint, and, the ap-

Ellis v. Bassett.

pellant electing to stand by his demurrer, final judgment was rendered against him.

The sufficiency of the complaint is the only question before us.

The complaint alleges, in substance, the following facts : That Henry Bassett, Sr., in his lifetime, was the owner and in possession of a tract of twenty acres of land, bounded on the north by a public highway, it being the only highway adjoining his land ; that Henry Bassett, Sr., died in the year 1880, and upon partition of his real estate, five acres on the north end of the twenty-acre tract were set off to his widow, Matilda Bassett ; that afterwards, in the year 1881, the other fifteen acres of land were sold at administrator's sale to the appellee, who received, and on the 19th day of December, 1881, caused to be recorded, an administrator's deed therefor ; that on the 14th day of March, 1883, the widow sold and conveyed the five-acre tract of land to the appellant.

It is also alleged that for many years previous to his death Henry Bassett, Sr., used as a roadway a strip of ground about one rod in width along the east side of the tract of land to reach the public highway on the north ; that the way was, and still is, necessary to the proper use and enjoyment of the fifteen-acre tract of land ; that at the time the plaintiff purchased the fifteen acres of land, and for many years prior thereto, this way was open and visible, and had for a long time been used by the owner for the passage of men, horses, and vehicles to and from the southern part of the twenty acres to the highway on the north ; that from the time of his purchase of the fifteen acre tract of land, he used the way as it had formerly been used, by and with the knowledge and consent of the widow, while she owned and held the five-acre tract, and with the knowledge and consent of the defendant, Rufus Ellis, after he purchased the same, until the autumn of the year 1886, when the defendant obstructed, and still obstructs, the use of the way by building fences across, and denying the right of the plaintiff to use the

Ellis v. Bassett.

same in passing to and from the fifteen-acre tract to the public highway on the north.

That the lands on the east, south and west of the fifteen-acre tract are owned by other persons, and the plaintiff has no right of way over the said lands from his land to any public highway.

The circumstances under which a way of necessity will arise is thus stated in Bishop Non-Contract Law, section 872: "If one conveys to another, out of a parcel of land, a part lying neither on the highway nor on the grantee's other land, it will be useless to the new owner unless he can have access to it; hence, by presumption of law, the deed carries with it to the grantee a right of way over the unconveyed part."

In Ballard Real Estate Statutes, section 371, it is thus defined: "Most common of ways implied are ways from necessity, as where one sells another land so surrounded by other lands as to be inaccessible except by passing over such grantor's land, the law implies the grant of way over such land."

To the same effect we cite Washburn Easements (4th ed.), 258; Goddard Easements, 269; *Anderson v. Buchanan*, 8 Ind. 132; *Stewart v. Hartman*, 46 Ind. 331; *Steel v. Grigsby*, 79 Ind. 184; *Logan v. Stogsdale*, 123 Ind. 372.

"A way of necessity can only be raised out of land granted or reserved by the grantor, but not out of the land of a stranger. For if one owns land to which he has no access except over lands of a stranger, he has not thereby any right to go across these for the purpose of reaching his own." 2 Washb. Real Prop. (3 ed.), 282; *Stewart v. Hartman*, *supra*, p. 341.

A right of way, upon a severance of the estate by partition between heirs, sometimes arises when it would not exist in case of a conveyance of one portion of the premises. And it may be laid down as a general rule that a partition of real estate among heirs carries with it by implication the same

Ellis v. Bassett.

right of way from one part to and over the other as had been plainly and obviously enjoyed by the common ancestor, in so far as it is reasonably necessary for the enjoyment of each part. *Goodall v. Godfrey*, 53 Vt. 219; *Collins v. Prentice*, 15 Conn. 39; *Burwell v. Hobson*, 12 Gratt. 322; *Kilgour v. Ashcom*, 5 Harr. & J. 82; *Seymour v. Lewis*, 13 N. J. Eq. 439; *Elliott v. Salle*, 14 Ohio St. 10.

Where the owner of an estate imposes upon one part an apparent and obvious servitude in favor of another, and at the time of the severance of ownership such servitude is in use, and is reasonably necessary for the fair enjoyment of the other, then, whether the severance is by voluntary alienation or by judicial proceedings, the use is continued by operation of law. *John Hancock M. L. Ins. Co. v. Patterson*, 103 Ind. 582.

The appellant contends that the complaint is defective for failing to allege that the plaintiff was unable to obtain a way to the highway over the lands of others. This point has been decided contrary to the views of the appellant. *Pernam v. Wead*, 2 Mass. 203; *Collins v. Prentice*, 15 Conn. 423.

It does not detract from the weight to be given these cases that at the time they were decided the laws of the respective States permitted the establishment of private ways upon payment of the damages caused by their opening.

The appellant also contends that the way claimed was not appurtenant to the dominant estate so as to pass with it in conveyances of the fee; also, that the complaint fails to show that the appellant had notice at the time of his purchase of the easement with which it was charged.

The facts stated in the complaint show that the way was a way of necessity, that it was open and visible, and had been used continuously for many years.

The same objections were made to the complaint in *Robinson v. Thrailkill*, 110 Ind. 117, in passing upon which ELLIOTT, C. J., says: "The complaint shows that the road purchased by the grantor of the appellees was 'in almost

Ellis v. Bassett.

constant use,' and this user was notice to the appellant. It is a familiar rule that possession is sufficient to put a purchaser upon inquiry, and that means of knowledge is equivalent to knowledge."

This is a concise statement of the law upon the subject, and is sustained by an unbroken line of authorities, among which we cite *Shirk v. Board, etc.*, 106 Ind. 573; *Randall v. Silverthorn*, 4 Pa. St. 173; *Zell v. Universalist Society*, 119 Pa. St. 390; *Cannon v. Boyd*, 73 Pa. St. 179.

That the way as described in the complaint was appurtenant and passed by a conveyance of the same, is established by the following, with many other cases: *Robinson v. Thrailkill, supra*; *Parish v. Kaspere*, 109 Ind. 586; *John Hancock M. L. Ins. Co. v. Patterson, supra*; *Ross v. Thompson*, 78 Ind. 90; *Davidson v. Nicholson*, 59 Ind. 411; *Keiper v. Klein*, 51 Ind. 316; *Moore v. Crose*, 43 Ind. 30; *Sanxay v. Hunger*, 42 Ind. 44.

It is also claimed that, if a way of necessity existed over the lands of the appellant, the selection or location of the way belonged to the appellant. The law is unquestionably as stated, but, according to the allegations of the complaint, the right of selection had been exercised by those under whom the appellant claimed title. The controversy between the parties was not as to the location of the way, but it was a denial of the existence of any way over the appellant's lands. Whether a way of necessity when once located can be changed to another portion of the servient estate is not before us in this appeal, and we do not therefore pass upon the question.

The court did not err in overruling the demurrer to the complaint.

Judgment affirmed.

Filed April 23, 1891.

LaMatt v. The State, *ex rel.* Lucas.

No. 14,919.

128 123
130 472

LAMATT v. THE STATE, EX REL. LUCAS.

BASTARDY.—*Inspection of Child.*—*Instruction to Jury.*—*New Trial.*—A new trial should not be granted in a bastardy proceeding because of alleged misconduct of the jury in inspecting the features of the child during a recess in the trial of the cause, where they were instructed that they had no right, in passing upon the question of paternity, to take into consideration the countenance of the child, or to inspect it, but that they must consider only the oral testimony.

SAME.—*Evidence.*—*Cross-Examination.*—Where the relatrix, in a bastardy proceeding, testifies on cross-examination by the defence to an act of intercourse other than that resulting in pregnancy, the State may be permitted to call a witness to corroborate her testimony.

, From the Wayne Circuit Court.

H. U. Johnson, for appellants.

W. F. Medsker and *C. E. Shively*, for appellee.

McBRIDE, J.—This was a bastardy proceeding. After the evidence had been heard, and while the argument to the jury was being made, the court adjourned for the day and the judge left the court room. Thereupon six of the jury engaged in trying the case approached the relatrix, and, with her consent, inspected the features of the bastard child. There was a verdict, finding that the defendant was the father of the child, and he insists that the action of the six jurors was such misconduct as entitled him to a new trial.

At the proper time the defendant presented to the judge, and asked to have given, the following special instruction:

“In passing upon the question as to whether or not the defendant is the father of the bastard child of Hattie Lucas, you have no right to take into consideration the countenance of said child. It was not proper for said child to be offered in evidence to you in the cause, nor for you to inspect it, or draw any conclusions whatever from its appearance.”

The court refused to give this instruction, but, instead, gave the following:

LaMatt v. The State, *ex rel.* Lucas.

“6. In passing upon the question as to whether the defendant is the father of the bastard child of Hattie Lucas, you have no right to take into consideration the countenance of said child, nor for you to inspect it, or draw any conclusion whatever from its appearance. But, in considering and determining this case, you must look only to and consider the oral testimony, and not the resemblance or non-resemblance of the child to the defendant.”

Assuming, without deciding, that the jurors were guilty of misconduct in inspecting the features of the child, the instruction given by the court was sufficient to cure any error that may have been committed so far as any question is presented to us by the record. We must assume, in the absence of any showing to the contrary, that the jury gave due heed to the instruction given, and were not in any manner influenced or governed by the inspection of the child's features. The instruction given was sufficient, and was quite as favorable as the defendant could ask to have given.

Counsel urges that as the evidence is conflicting, and, in his judgment, the testimony for the State weak and contradictory, we should assume that the judgment of the jury in weighing the evidence, and in deciding in favor of the State, must have been warped and influenced by the inspection of the child's features. As we have said, such presumptions as we are permitted to indulge in must be in favor of rather than against the action of the jury, and if they obeyed the instruction of the court, as we must presume they did, the appellant was not harmed.

During the trial of the cause the relatrix, on cross-examination, testified to several acts of sexual intercourse occurring between her and defendant aside from that which she claimed resulted in her pregnancy. Among the acts thus testified to was one which she claimed occurred in a wood-shed three or four years before the conception of the child. The State then, over the objection of the defendant, called as a witness one John Little, who testified that at the

Ries v. McClatchey.

time and place referred to, he and another saw the defendant and the relatrix in the wood-shed in question under circumstances tending to indicate that they had just been engaged in sexual commerce. The defendant urges that this was erroneous and should reverse the cause. The testimony of the relatrix, with reference to the act of intercourse in the wood-shed, was drawn out by the defence on cross-examination, and she was cross-examined thereon at some length. The State had the right under such circumstances to corroborate her if possible, and the testimony of the witness, Little, was competent for that purpose.

The judgment is affirmed, with costs.

Filed April 23, 1891.

No. 15,029.

RIES v. McCLATCHEY.

EXEMPTION.—Tort.—Under our statute, no exemption can be had upon a judgment rendered in actions for tort.

SAME.—Misjoinder of Causes of Action.—Contract and Tort.—But where the plaintiff improperly unites his right of action for a tort with his right of action on a contract, and takes judgment in such form as to preclude the possibility of separating one from the other, he thereby reduces his superior rights in the action sounding in tort to a level with his inferior rights in the action on contract, and the defendant is entitled to treat the judgment as rendered upon contract, and to claim his exemption.

From the Warren Circuit Court.

J. McCabe and *E. F. McCabe*, for appellant.

W. P. Rhodes, for appellee.

COFFEY, J.—This was an action by the appellee against the appellant to set aside a sheriff's sale of real estate.

The complaint alleges that the appellant recovered a judgment, in the Warren Circuit Court, against the appellee

Ries v. McClatchey.

upon a contract; that he caused an execution to issue thereon, which was levied upon the real estate described in the complaint; that at the time of the rendition of said judgment, and at the time of said levy, the appellee was, and for a long time prior thereto had been, a *bona fide* resident householder of Warren county, Indiana, and the head of a family; that he was not the owner of property of the value of \$600; that he made out and tendered to the sheriff holding the execution on said judgment a schedule of all his property, and demanded that the same be set off to him as exempt from execution, but that notwithstanding the premises the sheriff proceeded to, and did, sell said property, and the appellant became the purchaser thereof.

Prayer that the sale be set aside, and the title quieted.

A trial of the cause resulted in a finding and decree in favor of the appellee, from which this appeal is prosecuted. The only question in the case relates to the sufficiency of the evidence to sustain the finding of the court.

The real controversy arises out of the dispute as to whether the record in the suit of the appellant against the appellee, resulting in the judgment upon which the land was sold, furnishes sufficient evidence that the judgment was rendered upon a contract, express or implied, that record furnishing all the evidence in this cause upon that subject.

The judgment was rendered upon a complaint consisting of three paragraphs. The first paragraph is a common count for goods sold and delivered, to which is attached a bill of particulars. The bill of particulars consists of numerous items of charges and credits, showing a balance due thereon amounting to \$53.66. The judgment was rendered for that sum upon default.

The second paragraph of the complaint alleges that the defendant in that action bought certain described personal property from the plaintiff, and obtained possession thereof, fraudulently intending to cheat the plaintiff out of the same

Ries v. McClatchey.

by failing to pay therefor, and that at the time he purchased the same he did not intend to pay the plaintiff.

In this paragraph the plaintiff prayed for a judgment for \$100.

The third paragraph of the complaint charges the defendant in the action with taking certain described personal property of which the plaintiff was the owner; and converting it to his own use, and demands judgment for \$150.

In that action the appellee made default, and judgment was rendered against him, as we have stated, for the sum of \$53.66. The bill of particulars above referred to was verified by the affidavit of the appellant thereto attached.

Under our statute, no exemption can be had upon a judgment rendered in actions for tort. *Gentry v. Purcell*, 84 Ind. 83; *Nowling v. McIntosh*, 89 Ind. 593.

The judgment under investigation was rendered upon a complaint containing one paragraph based upon a contract and two based upon alleged tort. There is nothing in the record from which it can be ascertained with absolute certainty as to whether it is based upon the one paragraph or the other, or in part upon one and in part upon another, but it must not be forgotten that the presumption of law is always against fraud and wrong-doing.

In aid of this presumption, we think the fact that the judgment was rendered for the exact amount shown by the bill of particulars to be due, furnishes strong evidence that such judgment was based upon the first paragraph of the complaint, which counted upon a contract for goods sold and delivered.

Assuming, however, without deciding, that this evidence was not sufficient to prove that the judgment in question was rendered upon a contract, express or implied, we think the judgment of the circuit court should be affirmed upon another ground. It is conceded by the appellant that it was a misjoinder of causes of action to join with an action on contract a cause of action sounding in tort. In the action

Ries v. McClatchey.

sounding in tort the appellant's rights against the appellee were superior to his rights in the action on contract, in this: in the former he had the right to exhaust all the property of the appellee in the payment of any judgment he might recover, while in the latter the appellee had the right to six hundred dollars as exempt from execution.

The appellant could not enlarge his rights under the contract upon which he sues by improperly uniting it with his right of action sounding in tort. The rule is, that where a creditor has two classes of claims against his debtor, by uniting them in one suit, and obtaining judgment thereon, he reduces that in which his rights are superior to a level with that in which his rights are inferior. *Freeman Executions*, section 217; *Heckox v. Fay*, 36 Barb. 9; *Holmes v. Farris*, 63 Maine, 318.

In this case there may be doubt as to whether the judgment rests upon the paragraph of the complaint based upon the contract, or upon the paragraphs based upon the tort therein set out, or as to whether the judgment is based in part upon the contract and in part upon the tort. If the judgment was based in part upon the contract and part upon the tort, if the amount recovered on the tort could be ascertained, the appellee would have the right to pay that amount and claim his exemption on the former. *Keller v. McMahon*, 77 Ind. 62.

By improperly uniting his right of action for the tort with his right of action on the contract, and taking judgment in such form as to preclude the possibility of separating one from the other, the appellant has reduced his rights as against the appellee to the rights he possessed under the contract.

The appellee, therefore, is entitled to treat the judgment as one rendered upon the contract, and is entitled, in our opinion, to claim and have his exemption.

Judgment affirmed.

Filed April 24, 1891.

Osborne et al. v. The State, ex rel. Michaels.

No. 14,813.

OSBORNE ET AL. v. THE STATE, EX REL. MICHAELS.

128	129
149	233
149	288
149	314
150	462

OFFICE.—Township Trustee.—Defalcation.—Vacation of Office.—Appointment of Successor.—Where an officer becomes a defaulter, flees the State, leaves no one to care for the public affairs, and indicates a settled purpose to abandon the office, it may be deemed vacant without a judicial determination, and the vacancy may be filled by appointment. The sureties on the bond of the defaulting officer can not challenge the right of the appointee to prosecute an action for the recovery of the public money.

SAME.—The presumption is that the power of appointment is rightfully exercised by the officer invested with that power.

SAME.—Collateral Attack.—Where there has been an appointment to, and the actual incumbency of an office, a collateral attack on the right of the appointee to hold the office is unavailing.

SAME.—Reports.—Evidence.—The reports of a township trustee, showing an indebtedness to the township, will, unless satisfactorily contradicted, warrant a finding against him and his sureties.

From the Wabash Circuit Court.

A. Taylor, for appellants.

J. Mitchell, for appellee.

ELLIOTT, J.—The initial question in this case is whether the relator has the capacity to maintain this action. Whether he has that capacity depends upon whether the office of township trustee was vacant at the time of his appointment to it. If it was not vacant, the action must fail. The facts relevant to this question are, in substance, these: In April, 1882, John G. McIlvaine was elected township trustee of Jackson township, Miami county; in 1884 he was elected his own successor, and, as such, duly qualified. McIlvaine lost a large sum of money belonging to the township in speculations, and was unable to repay it. He fled to Kentucky. His declarations indicate a settled intention to vacate his office, and he left no one to discharge its duties for him. In our opinion the office became vacant. When an officer becomes a defaulter, flees the State, leaves no one to care for the public affairs, and indicates a settled purpose to abandon the

Osborne et al. v. The State, ex rel. Michaels.

office, it may be deemed vacant without a judicial determination. It would imperil public interests and benefit no one in such a case to adjudge that the office can not be deemed vacant until so declared by the courts. If the officer were insisting upon his right to the office, we should have a different case, but here there is evidence of a complete abandonment and a defalcation, and here, too, the object of the action is to recover the money of the public. We are fully within the authorities in holding that there was a vacancy and a right to fill it by appointment. *State, ex rel., v. Jones*, 19 Ind. 356; *State, ex rel., v. Allen*, 21 Ind. 516 (83 Am. Dec. 367); *Yonkey v. State, ex rel.*, 27 Ind. 236; *Krant v. State*, 47 Ind. 519; *Gosman v. State, ex rel.*, 106 Ind. 203 (209); *Mowbray v. State, ex rel.*, 88 Ind. 324; *People, ex rel., v. Common Council, etc.*, 77 N. Y. 503 (33 Am. R. 659); *People, ex rel., v. Green*, 58 N. Y. 295; *Curry v. Stewart*, 8 Bush (Ky.), 560; *Prather v. Hart*, 17 Neb. 598. It would be palpably unjust to permit the sureties on the bond of a defaulting officer who has fled the State and asserts an intention to abandon his office, to challenge the right of the person appointed to fill the abandoned office to prosecute an action for the recovery of the public money.

The appointment of the relator by the auditor did not create a vacancy; the vacancy was created by the acts of McIlvaine. When these acts were performed the office became vacant. *Hedley v. Board, etc.*, 4 Blackf. 116. The appointment filled, but did not create, a vacancy. The presumption is that an appointment made by an officer having power to appoint is rightfully made, whenever it appears that the appointee duly qualified and entered into possession of the office. *Commonwealth, ex rel., v. Slifer*, 25 Pa. St. 23 (64 Am. Dec. 680).

There was an appointment and an actual incumbency, so that the collateral attack which the appellants here make would be unavailing, even if there were some grounds for their assertion that the relator is not the *de jure* township

Huffmond *et al.* v. Bence, Administrator.

trustee. *State v. Mayor, etc.*, 8 Lawyers' Rep. Ann. 697; *Town of Kissimmee City v. Cannon* (Fla.), 7 So. R. 523. In whatever aspect this case is viewed, the law clearly appears against the appellants upon the question stated.

The other questions in the case arise upon the evidence, and, in effect, are narrowed to the single question whether the finding is supported by the evidence. That there is evidence supporting the finding there can be no doubt, and when that appears our duty ends, for we can not interfere simply because there may be some conflict. The reports of the trustee are *prima facie* evidence of his indebtedness. *Strong v. State, ex rel.*, 75 Ind. 440; *Ohning v. City of Evansville*, 66 Ind. 59, and cases cited. The admissions of such reports, unless satisfactorily contradicted, will warrant a finding against the officer and his sureties, and the reports of McIlvaine have not been so contradicted. The evidence shows, indeed, that the public money was lost in speculations.

Judgment affirmed.

Filed April 23, 1891.

No. 14,983.

HUFFMOND ET AL. v. BENCE, ADMINISTRATOR.

SUBROGATION.—*To Rights of Grantor.*—*Conditional Conveyance.*—Where the owner of real estate conveys it in consideration that the grantee shall board, nurse and care for him during his lifetime, and by reason of the failure of such grantee to provide necessary medical aid he is compelled himself to call a physician, such physician will be subrogated to the rights of the owner, and may enforce a lien for the value of his services upon the real estate conveyed.

SUPREME COURT.—*Practice.*—*Overruling Request for Jury.*—Error in overruling a motion to try the issues in the case by a jury can be presented on appeal only by a motion for a new trial.

From the Putnam Circuit Court.

D. E. Williamson and *A. C. Daggy*, for appellants.

S. A. Hays, for appellee.

128	131
131	584
128	131
149	44
150	478
152	555

Huffmond et al. v. Bence, Administrator.

OLDS, C. J.—Jane Rudisill and her husband, David Rudisill, each owned a town lot in the city of Greencastle, and on the 11th day of January, 1881, they joined in a deed and conveyed both of said lots to their daughter, the appellant Surrilda Huffmond. The consideration for such conveyance, as stated in the deed, was one dollar, and in consideration of said Surrilda having boarded, nursed, waited upon and taken care of said Jane and David during the two years before that date last past, and the further consideration that she, said Surrilda, agrees to continue to board, nurse, and take proper care of said Jane and David during their natural lives, reserving to each of said grantors the possession and control by each of the respective lots owned by each during their natural lives. David died intestate. The appellee, Bence, was appointed administrator of his estate, and he filed a claim against said estate in his own favor for one hundred dollars for medical and surgical treatment rendered to the said David in his last sickness. The said Bence filed a complaint against the estate, making the appellant and her husband parties, in which is alleged the conveyance of said real estate by the said Jane and David Rudisill to said appellant in consideration of the agreement stated in said deed; that at the time of said conveyance, prior thereto, and up to the date of his death, said David was afflicted with strangulated hernia, and was subject to frequent attacks of the same; that nursing and taking proper care required that when said David was attacked and afflicted with strangulated hernia it be reduced; that after said conveyance it was mutually agreed between said appellant and David that they should sell said lot, the title to which had been in David prior to the conveyance to appellant, and that the proceeds thereof should be invested in other real estate, the title to be taken in the appellant, reserving the use and control to David during his life, under the same conditions, agreement, and for the same consideration, as the first lot so conveyed as aforesaid was conveyed to said appellant, and that in

Huffmond et al. v. Bence, Administrator.

pursuance of said agreement they did sell said lot, and joined in a deed, and conveyed the same to the purchaser, and purchased with the proceeds thereof another tract of land, and took the title to the same in the appellant, granting to the said David the use and control of the same during his life, simply substituting the real estate purchased for that sold under the same agreement to nurse and properly take care of the said Jane and David; that David took possession of said tract so purchased, and held the same until his death, when the appellant took possession, and has ever since held the same; that in 1883 the said David was attacked with strangulated hernia, and was in great need of medical and surgical aid and treatment to be relieved, and have the hernia reduced; that he called upon the appellant to provide him with proper medical aid to relieve him, which she neglected and refused to provide for him; and while so afflicted he called upon the said claimant, Bence, and he reduced the hernia, and rendered the services of the value of one hundred dollars, which he seeks to recover; that such services so rendered were necessary to the proper nursing and taking proper care of said David, as the appellant had contracted to do; that when said services were so rendered, and at the date of the death of said David, he had no other property than that conveyed as aforesaid; and said claimant asks that he have judgment against the estate, and said Surrilda Huffmond for the amount of his claim, and that the same be declared a lien upon all of said real estate so conveyed to and now owned by the said appellant, describing it, and that the same be subjected to sale for the payment of said claim.

The appellant demurred to the complaint for want of facts, and upon the grounds that she was an improper party.

It is contended that under the contract as stated in the deed the appellant was not under any obligation to furnish medical aid. We can not concur in such a construction of the contract.

It appears from the averments in the complaint that Jane

Huffmond et al. v. Bence, Administrator.

and David Rudisill conveyed to their daughter, the appellant, all the real estate they owned, and being all of their property, she agreeing in consideration therefor "to board, nurse and take proper care of them, the said Jane Rudisill and David Rudisill, during their natural lives." The agreement to board, nurse, and take proper care included the doing and furnishing to them whatever was reasonably necessary for their subsistence and comfort. It would be unreasonable to so construe such an agreement as that the child might stand by in times of sickness and permit the parent to suffer and die for want of reasonable and proper medical aid, and yet not be liable for a breach of the contract. Such treatment and neglect would not be a compliance with the contract either in regard to the nursing or taking proper care. To nurse and take proper care, in the sense in which they are used in this agreement, mean to supply the grantors with and to do for them whatever was necessary in case of sickness to restore them to health again; and, if the appellant could not supply such wants or render such services in person, she was bound to provide them such nursing and care, even if she had to employ others to render the services. The contract did not limit the appellant's liability to such nursing and care as she was able to render to them in person.

The complaint alleges facts showing a necessity for the reduction of the hernia, and that it was proper care and nursing to have it reduced; that the decedent requested the appellant to have it done, to employ a physician, and she refused to do so, and thereupon he called upon and employed the claimant, Bence, who undertook to and did reduce it, and that proper nursing required the reduction of the hernia.

The averments of the complaint show that the appellant refused to comply with her contract, and perform her part of the agreement she had entered into with the decedent, and he was compelled to procure another person to do what the appellant had agreed to do. Under the decisions of this court he had a right at least to recover from her the amount he was

Huffmond *et al.* v. Bence, Administrator.

compelled to pay by reason of her neglect and refusal to comply with her contract, and to have it declared a lien upon the property so conveyed to her as a consideration for such services. Some of the decisions even go far enough to hold it to be a condition subsequent, the non-performance of which worked a forfeiture of the land conveyed, but it is not necessary to go to that extent in this case. *Hamilton v. Barricklow*, 96 Ind. 398; *Lindsay v. Glass*, 119 Ind. 301; *Richter v. Richter*, 111 Ind. 456; *Ikerd v. Beavers*, 106 Ind. 483; *Copeland v. Copeland*, 89 Ind. 29.

The decedent having the right to call upon claimant to render the services contracted to be performed by the appellant, and which she failed to render, and having a right to collect from her the amount necessarily paid out, and having a lien declared; the appellee, Bence, having performed the services at the request of the decedent, the value of which the decedent had a right to recover, and had a lien securing the same,—the appellee, Bence, has the right in equity to be substituted to the rights of the estate. To illustrate the principle more clearly, suppose the debt had matured in the lifetime of the decedent, the parties would be in the position of the decedent owing the debt to Bence, and his daughter would be owing it to the father, the decedent, and it would be secured by a lien on the real estate. The father being insolvent, the only method by which the debt could be collected would be by foreclosure of the lien. If the appellee, Bence, could not be subrogated to the rights of the father by reason of the debt secured by the lien being in fact due to him, he would be without remedy. Certainly, under such circumstances, in the lifetime of the father, the appellee, Bence, could have enforced the lien and collected his debt, and he does not lose this right by his death. The same principle is applicable as in case of a surety holding an indemnity. As in case of a surety taking a mortgage indemnifying him against the payment of the debt of the principal, the surety being insolvent, the creditor may be

Huffmond et al. v. Bence, Administrator.

subrogated to the rights of the surety, and foreclose the mortgage given to the surety to secure the debt.

In this case the appellant Mrs. Huffmond is, in fact, the principal debtor. She is the person ultimately liable to pay the debt, though upon the face of the contract she is liable directly to her father, and the debt is secured by a lien upon her land. In principle it is like unto a case where A. and B. make an agreement whereby A. purchases property of C. and gives his note to C. for the amount; afterwards A. turns over the property to B., and B. gives to A. a mortgage to indemnify him against the payment of the debt. A. is insolvent. A suit against him by C. would be of no avail, but B. has agreed and is liable for the payment of the same debt to A., and has received a consideration for such agreement, and has secured its payment by a mortgage. Clearly C. would have a right to be subrogated to the rights of A., and foreclose the mortgage and collect his debt.

In this case Mrs. Huffmond, by the contract, indemnified David Rudisill, by a lien upon her real estate, against any expense or liability for services in being nursed and taken proper care of during life. She fails to comply with the agreement, and he is compelled to and does call upon Bence to render to him the services Mrs. Huffmond had agreed to render. Mrs. Huffmond is liable to pay to Rudisill the value of the services, but he has no money or property wherewith to pay for the service, and it is but equity that Bence should have the right to be subrogated to the rights of Rudisill, and collect from Mrs. Huffmond the debt.

It is but permitting the relief to be granted in the one action which otherwise would require two. The identical debt for which Mrs. Huffmond is liable is due to Bence who rendered the services. Mrs. Huffmond was, in fact, the principal debtor, and her father was her surety, though primarily liable to Bence. It is settled law that securities held by a surety for the payment of a debt are held by him for the payment of the debt, and the creditor may resort to them for a

Huffmond *et al.* v. Bence, Administrator.

collection of his debt. See *Rittenhouse v. Kemp*, 37 Ind. 258, 262, and authorities cited; *Sanders v. Weelburg*, 107 Ind. 266. In *Rooker v. Benson*, 83 Ind. 250, it is held that subrogation does not depend on privity or strict suretyship. It is the mode in which equity compels the ultimate discharge of a debt by him who in good conscience ought to pay it, and to relieve him whom none but the creditor could compel to pay it; and this doctrine is applicable to the facts in this case.

There was no error in overruling the demurrer.

The next error assigned is the sustaining of the demurrer to the second paragraph of the appellant's answer. There is no discussion of the question presented by this ruling, except to say that it is a good answer. We think there is no error in sustaining the demurrer.

The next error is that the court erred in overruling appellant's motion and request to try the issues in the case by a jury.

In *Ketcham v. Brazil, etc., Co.*, 88 Ind. 515, it is held that this question can only be presented by motion for a new trial.

The only additional error discussed relates to the sufficiency of the evidence. There is some evidence supporting the finding, and we can not disturb it.

There was no objection to the order and judgment in the case and no motion to modify it, and no question is presented as to the right of the appellee to a lien upon the real estate purchased and conveyed to the appellant by the third party in lieu of the lot originally conveyed by the Rudisills.

The judgment is affirmed, at costs of the appellant.

COFFEY, J., took no part in the decision of this case.

Filed April 24, 1891.

Mann v. The Belt Railroad and Stock Yard Company.

No. 14,077.

MANN v. THE BELT RAILROAD AND STOCK YARD COMPANY.

RAILROAD.—Crossing.—Duty of Person Approaching.—The presence of a railroad track upon which a train may at any time pass is notice of danger, and it is the duty of a person about to cross such road, on a public highway, to exercise caution in so doing, and to look both ways for approaching trains, if the surroundings are such as to admit of such a precaution.

SAME.—Mental absorption, or reverie, induced by grief or business, will not excuse the omission of the duty to look and listen.

SAME.—Accident at Crossing.—Contributory Negligence Declared as Matter of Law.—In an action against a railroad company for an injury at a railroad crossing, it appeared that the plaintiff, who was approaching in a vehicle, and was familiar with the crossing, when about two hundred and fifty feet from the crossing looked to the east, where he could see about one-fourth of a mile, and saw no approaching train. He did not look to the east again, but looked to the west, where the view of the track was somewhat obstructed. If he had looked to the east, when within one hundred feet of the railroad, he would have had an unobstructed view of nearly one-half mile. He drove to the crossing in a slow trot, and was struck by a train from the east and seriously injured. No signals were given by the approaching train.

Held, that the court might adjudge, as matter of law, that the plaintiff was guilty of contributory negligence.

From the Marion Superior Court.

B. Harrison, W. H. H. Miller, J. B. Elam, F. Winter and J. P. Baker, for appellant.

A. C. Harris, A. L. Roache and E. H. Lamme, for appellee.

COFFEY, J.—This action was begun on the 17th day of August, 1882, to recover damages sustained by the appellant in a collision with one of the appellee's trains at a highway crossing.

On a trial of the cause the appellant had judgment. An appeal to this court resulted in a reversal of the judgment, and the cause was remanded to the Marion Superior Court for further proceedings.

128	138
128	100
128	590
128	138
130	177
128	138
131	63
131	431
131	497
128	138
134	29
134	275
136	44
128	138
142	272
142	624
143	410
143	457
143	596
128	138
144	457
128	138
148	63
148	310
150	579
151	622
152	516
128	138
159	185
128	138
163	614
128	138
164	373
128	138
166	66
128	138
171	597

Mann v. The Belt Railroad and Stock Yard Company.

The cause was again tried, at special term, resulting in another judgment in favor of the appellant. Upon appeal to the general term the judgment was reversed, upon the ground that the evidence did not support the verdict. From the judgment of the general term, reversing the judgment at special term, this appeal is prosecuted.

The controlling facts in the case are, that, on the 25th day of June, 1882, in the afternoon of Sunday, the appellant, with a friend, was riding on a public highway south of the city of Indianapolis, known as the Churchman Turnpike Road, in an open vehicle drawn by one horse. The road was crossed by the double track of the appellee's road, which, at the point of crossing, runs in a northeasterly and southwesterly direction. The turnpike runs north and south, and is itself crossed at right angles by a street known as Cypress, at a point 316 feet north of the crossing of the turnpike and the appellee's railroad, at the place where the appellant received his injuries. The appellee's railroad crosses Cypress street at a distance of 345 feet east from the center of the turnpike. From the point in Cypress street crossed by the appellee's railroad said road runs southwest, and at a distance of 470 feet intersects the turnpike at the place where the appellant was injured. As the appellant was travelling south on the turnpike, a locomotive and two or three freight cars came down from the northeast, and, as appellant was attempting to cross the track in the vehicle with his friend, the locomotive struck the horse and overturned the vehicle, resulting in serious and permanent injuries to the appellant. At the point where the injury occurred there was a grade of about twenty feet to the mile to the west, the steam was shut off, and the fireman was outside on the locomotive oiling the machinery, which could only be done when the locomotive was in motion.

There is some conflict as to the rate of speed at which the train was running, but we must assume here that the speed was that contended for by the appellant, which is thirty

Mann v. The Belt Railroad and Stock Yard Company.

miles an hour. There was no one on the train except the conductor, engineer and fireman. The train as it approached the crossing made but little noise. To the west of the crossing there was a cut a few feet in depth, on the top of which was standing an open board fence, though trains passing through the cut could be seen, while so passing, by persons on the turnpike. Soon after crossing Cypress street, and at a point 250 or 275 feet from the place of the injury, the appellant looked to the east for approaching trains, and did not hear or see any, and thereafter neither he nor his friend looked in that direction, but both looked to the west, the view of which was somewhat obstructed as above stated. To the northeast from the point where they looked to the crossing there were no obstructions, the country being level, affording a free and unobstructed view of the track and along it for a distance northeast of about 1,500 feet east; while at a point about 100 feet from the crossing the track northeast could be seen for nearly one-half mile. The parties drove to the crossing in a slow trot, and did not stop until the collision occurred.

They were familiar with the crossing and had been familiar with it for many years. Those in charge of the train did not blow the whistle or ring the bell. The railroad was not used for travel by passengers, but only for switching and transferring freight trains and empty cars around the city of Indianapolis.

Northeast of the crossing where the injury occurred, the appellee's railroad crosses three other public highways, namely: Cypress street at a distance of 470 feet, Higgins' Branch 309 feet further, and Knox street 420 feet from Higgins' Branch.

To the southwest there were no crossings within three-fourths of a mile.

The appellant knew and was familiar with all the surroundings.

The contention of the appellant, as we understand the ar-

Mann v. The Belt Railroad and Stock Yard Company.

gument of counsel in their able brief, is, that under the facts above stated the question of contributory negligence is one for the jury, under proper instructions from the court. In other words, that it was for the court to say what *sort* of care was required by the appellant in approaching the crossing at which he was injured, but it was for the jury to determine whether he exercised the *quantity* of care required by the law.

It has often been decided by this court, as well as by all the other courts of last resort in the United States, that there is a class of cases in which the court will adjudge, as matter of law, that a party has or has not, under the given state of facts, been guilty of negligence; while in another class of cases the question of negligence will be left to the jury under proper instructions from the court. Smith Law of Neg., pp. 9-12; *Wabash, etc., R. W. Co. v. Locke*, 112 Ind. 404; *Evans v. Adams Ex. Co.*, 122 Ind. 362; *Directors, etc., v. Jackson*, 3 App. Cases H. L. 193; *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261; *Baltimore, etc., R. R. Co. v. Walborn*, 127 Ind. 142; *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31; *Chicago, etc., R. W. Co. v. Hedges*, 118 Ind. 5; *Indiana, etc., R. W. Co. v. Hammock*, 113 Ind. 1; *Schofield v. Chicago, etc., R. W. Co.*, 114 U. S. 615; *Bellefontaine R. W. Co. v. Hunter*, 33 Ind. 335; *Indiana, etc., R. W. Co. v. Greene*, 106 Ind. 279.

It is claimed by the appellant that this case falls within the latter class, while on the other hand it is earnestly contended by the appellee that it belongs to the former.

Cases belonging to the first class exist where the facts are undisputed, and the inferences to be drawn from such facts are not equivocal, and lead to but one conclusion, while cases of the second class exist where there is a dispute as to the facts, or where the facts being admitted different inferences can reasonably be drawn from such facts. If such a state of facts exists as that one sensible, impartial man would infer that proper care had not been used, and that negligence

Mann v. The Belt Railroad and Stock Yard Company.

existed, while another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence, it is said to be the highest effort of the law to obtain the judgment of twelve men of the average of the community, comprising men of learning, men of little education, men whose learning consists only of what they have themselves seen and heard, the merchant, mechanic, the farmer and the laborer, as to whether negligence does, or does not, exist in the given case. Such judgment is supposed to be more valuable in such cases than the judgment of a single judge. *Railroad Co. v. Stout*, 17 Wall. 657; *Ohio, etc., R. W. Co. v. Collarn, supra*; *Baltimore, etc., R. W. Co. v. Walborn, supra*.

In cases of this class it is clearly the duty of the court to determine the *kind* of care to be used, while it is the exclusive province of the jury to determine the *quantity*.

In order to correctly solve the question as to whether this case belongs to the class where the court will adjudge the question of negligence as a matter of law, or will refer it to the jury under proper instructions, it is necessary to know what duty, if any, the law imposes upon one approaching a railroad crossing; the *kind* of care required, and whether the law undertakes to measure the *quantity*.

“When one approaches a point upon the highway, where a railroad track is crossed upon the same level, it is his plain duty to proceed with caution, and if he attempts to cross the track, either on foot or in a vehicle of any description, he must exercise, in so doing, what the law regards as ordinary care under the circumstances. He must assume that there is danger, and act with ordinary prudence and circumspection upon that assumption. The requirements of the law, moreover, proceed beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances. The law defines precisely what the term ‘ordinary care under the circumstances’ shall mean in these cases. In the progress of the law in this behalf, the

Mann v. The Belt Railroad and Stock Yard Company.

question of care at railway crossings, as affecting the traveller, is no longer, as a rule, a question for the jury. The quantum of care is exactly prescribed as matter of law. In attempting to cross, the traveller must listen for signals, notice signs put up as warnings, and look attentively up and down the track. * * * If a traveller, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is held negligence *per se*." Beach Contributory Negligence, p. 191, section 63; *Ohio, etc., R. W. Co. v. Hill*, 117 Ind. 56.

Where a person thus approaching a railroad crossing could have seen the train by looking, before he attempts to cross, and a collision occurs, it will be presumed he did not look, and by the neglect of so plain a duty he is guilty of such negligence as precludes him from recovering. *Wilcox v. Rome, etc., R. R. Co.*, 39 N. Y. 358.

Mental absorption, or reverie, induced by grief or business, will not excuse the omission of the duty to look and listen. *Havens v. Erie R. W. Co.*, 41 N. Y. 296.

The presence of a railroad track upon which a train may at any time pass, is notice of danger, and it is the duty of a person about to cross such road, on a public highway, to exercise caution in so doing, and to look both ways for approaching trains, if the surroundings are such as to admit of such a precaution. *St. Louis, etc., R. W. Co. v. Mathias*, 50 Ind. 65; *Pittsburgh, etc., R. W. Co. v. Martin*, 82 Ind. 476; *Terre Haute, etc., R. R. Co. v. Clark*, 73 Ind. 168; *Pennsylvania, etc., R. R. Co. v. Richter*, 42 N. J. L. 180; *Gorton v. Erie R. W. Co.*, 45 N. Y. 660; *Schofield v. Chicago, etc., R. W. Co.*, *supra*; *Cleveland, etc., R. R. Co. v. Crawford*, 24 Ohio St. 631; *Stubley v. London, etc., R. W. Co.*, L. R. 1 Ex. 13; *Conner v. Citizens, etc., R. W. Co.*, 105 Ind. 62; *Bellefontaine R. W. Co. v. Hunter*, *supra*.

Mann v. The Belt Railroad and Stock Yard Company.

It will be seen by an examination of the authorities above cited that the law clearly prescribes the *kind* of care to be exercised by one about to cross a railroad on a public highway, and that it undertakes to measure, to some extent, the *amount*, or *quantity*, of care to be exercised in such cases.

In this case the appellant, when two hundred and fifty, or two hundred and seventy-five feet from the railroad, looked along the same eastward, when he could see a distance of about one-fourth of a mile, and saw no approaching train. He did not look again, but drove upon the track where the collision occurred. Had he looked when within one hundred feet of the railroad he would have had an unobstructed view of nearly one-half mile. He was familiar with the crossing, and it must be presumed he knew this fact. When it is said that a person approaching a railroad crossing must look and listen attentively for approaching trains, it is not to be understood that he may look from a given point, and then close his eyes; but it is to be understood that he must exercise such care as a reasonably prudent person, in the presence of such a danger, would exercise to avoid injury.

The courts can not close their eyes to matters of general notoriety, and to matters of every day observation.

We must know that a train of cars passing over iron or steel rails at a speed of thirty miles an hour does not do so without noise. We must know, too, that where a person possessing good eye-sight, located within one hundred feet of the track, has an unobstructed view of such track for a distance of near one-half mile, he can not fail to see an approaching train before it reaches him, if he looks attentively, and that if he is possessed of ordinary hearing he could not fail to hear it when listening attentively, if running at the speed of thirty miles an hour. When about to enter upon the crossing, looking in one direction only is not the diligence required by the law, for the law requires him to look in both directions if it is possible to do so. As a rule, it is not necessary to stop and listen or look where approaching

Budd v. Reidelbach.

danger can be otherwise ascertained, but one approaching such crossing must exercise such care as will enable him, under the circumstances, to inform himself of the extent of the danger attending the crossing the track if he can reasonably do so. This appellant did not do. In our opinion, the facts in this case do not bring it within the class of cases where the court will determine the *kind* of care to be used, and leave the jury, under proper instructions, to determine the *amount*; but it belongs to that class where the court will adjudge, as matter of law, that the party was negligent.

Having reached this conclusion, it follows that the superior court of Marion county, in general term, did not err in holding that the evidence in the cause was not sufficient to sustain the verdict of the jury.

Some questions are made and argued in relation to the refusal of the court below to give to the jury certain instructions asked by the appellee, but having reached the conclusion that the evidence does not support the verdict of the jury, we deem it unnecessary to examine or decide these questions.

The judgment of the superior court of Marion county, at general term, is affirmed.

ELLIOTT, J., took no part in the decision of this case.

Filed Feb. 18, 1891; petition for a rehearing overruled May 14, 1891.

No. 14,899.

BUDD v. REIDELBACH.

DRAINAGE.—*Establishment of Ditch.*—*Verdict.*—*Sufficiency of.*—In a proceeding to establish a public ditch, a verdict reading: "We, the jury, find for the petitioner that the proposed ditch will be of public benefit and utility; that the assessments for its construction are in proportion to its benefits; and that the route thereof is practicable," fills the requirements of

VOL. 128.—10

128	145
130	506
128	145
142	401
128	145
158	336
128	145
163	235
163	498
128	145
168	562

Budd v. Reidelbach.

section 4294, R. S. 1881, and is sufficient where no objection is made by remonstrance or otherwise in the commissioners' court.

SAME.—*Appeal from Commissioners.—Questions Triable in Circuit Court.*—On appeal to the circuit court from the order of the commissioners establishing a ditch, only such objections can be relied on as were appropriately presented to the board of commissioners.

From the Pulaski Circuit Court.

J. C. Nye and *R. A. Nye*, for appellant.

W. Spangler and *H. A. Steis*, for appellee.

ELLIOTT, J.—The appellee petitioned for the construction of a public ditch; viewers were appointed; they first reported adversely to the petitioner, but subsequently met under the order of the court and reported in his favor. The appellant's land was assessed. He did not, so far as the record discloses, file any motion or remonstrance in the commissioners' court nor in the circuit court. He appealed from the order of the commissioners, and insists upon a reversal of the judgment of the circuit court, upon the ground that it erred in overruling his motions for a *venire de novo* and for a new trial.

The verdict reads thus: "We, the jury, find for the petitioner, Reidelbach, that the proposed ditch will be of public benefit and utility; that the assessments for its construction are in proportion to its benefits; and that the route thereof is practicable." This verdict finds all that the statute under which the proceedings were had requires the board of commissioners to find. Section 4294, R. S. 1881. This we deem sufficient in view of the fact that no remonstrance was filed by the appellant. We do not mean to be understood as holding that it was necessary for the verdict to be as full as it is, for the appellant presented no issue for trial. We can not, indeed, perceive upon what ground he had a right to go to the jury. He acquiesced in the finding of the viewers because he made no objection. It has been again and again decided in this class of cases that only such objections can be relied on in the circuit court as were appropriately pre-

The First National Bank of Peru v. Parsons, Assignee.

sented to the board of commissioners. *Updegraff v. Palmer*, 107 Ind. 181; *Lipes v. Hand*, 104 Ind. 503; *Smith v. Smith*, 97 Ind. 273; *Rominger v. Simmons*, 88 Ind. 453; *Lowe v. Ryan*, 94 Ind. 450; *Reynolds v. Schults*, 106 Ind. 291; *Green v. Elliott*, 86 Ind. 53.

In the case of *Metty v. Marsh*, 124 Ind. 18, it was said: "It has so often been adjudged by this court, in cases analogous to this, that no matter not put in issue before the board of commissioners can be tried on appeal to the circuit court, that but little can be said in elaboration of the principle."

The error of the trial court was in permitting a trial, since there was no issue to try, but of this the appellant can not complain.

What we have said effectually disposes of the specification of error based on the ruling denying a new trial.

Judgment affirmed.

Filed April 25, 1891.

No. 14,681.

**THE FIRST NATIONAL BANK OF PERU v. PARSONS,
ASSIGNEE.**

PARTNERSHIP.—Surviving Partner.—Execution of Chattel Mortgage to Secure Firm Debt.—A surviving partner of an insolvent firm may make a valid chattel mortgage of the partnership property to secure a firm debt.

SAME.—Section 6046, R. S. 1881.—Sections 6046, *et seq.*, R. S. 1881, relating to the filing of inventories and appraisements by the surviving partner, do not forbid the making of such mortgage.

From the Miami Circuit Court.

L. Walker, W. B. McClintic, H. J. Shirk and J. Mitchell,
for appellant.

R. P. Effinger, R. J. Loveland and H. P. Loveland, for ap-
pellee.

128	147
129	284
138	147
140	391
128	147
150	313

The First National Bank of Peru v. Parsons, Assignee.

McBRIDE, J.—On and before October 8, 1887, Philip H. Curran and Philip Q. Curran were partners, engaged in business at Peru, each owning a half interest in the business. On that date Philip Q. Curran died, the firm being at that time indebted to various parties, and among others to the appellant. On the 22d day of October, 1887, the surviving partner executed a chattel mortgage to appellant on a stock of goods belonging to the partnership, to secure said debt due to appellant, the mortgage being duly recorded the same day. On the 25th day of October, 1887, said surviving partner made a general assignment of all the firm property for the benefit of its creditors, under section 2683, R. S. 1881, and the only question presented by the record is as to the power of the surviving partner to make a valid chattel mortgage of the partnership property. The controversy arises between the assignee and the holder of the mortgage. The court below held that the mortgage was invalid, upon the ground, the appellant informs us, that the statute relative to surviving partners gives no power to surviving partners to execute mortgages. Our only information upon this subject we derive from the brief of appellant, for the reason that the appellee has not favored us with a brief.

The question here involved was decided by this court in the case of *Hadley v. Milligan*, 100 Ind. 49. In that case the surviving partner of an insolvent partnership executed a chattel mortgage upon partnership assets to secure a firm liability, and as in this case, subsequently made an assignment of all the partnership property for the benefit of the partnership creditors. The holder of the mortgage brought suit to foreclose the mortgage, making the assignee, with others, defendants. The court below overruled a demurrer to the complaint. The court says: "The complaint is in the usual form upon the notes, and for the foreclosure of the mortgage, alleging the death of one of the partners, and the execution of the mortgage by the surviving partner. We think the complaint is sufficient."

The First National Bank of Peru v. Parsons, Assignee.

That case was decided since the enactment of the present statute relative to surviving partners, and is precisely in point. It is in accordance with the great weight of authority, and we think it was decided correctly. *Egberts v. Woods*, 3 Paige, 516; *Loeschigk v. Hatfield*, 51 N. Y. 660; *Cushman v. Addison*, 52 N. Y. 628; *Williams v. Whedon*, 109 N. Y. 333; *Beste v. Burger*, 110 N. Y. 644; *Emerson v. Senter*, 118 U. S. 3; *Bohler v. Tappan*, 1 McCrary, 134 (1 Fed. R. 469).

The statute relative to surviving partners (sections 6046, *et seq.*, R. S. 1881) does nothing more than place certain restrictions upon the power of surviving partners, by requiring the filing of inventories, appraisements, lists of liabilities, etc., and by requiring the filing of a bond. The nature and extent of the interest in the partnership property which pass to him on the death of his partner are not changed or affected in any way by the statute, nor does the statute purport to direct or affect the manner in which he may dispose of and apply the firm assets. In this respect the surviving partner is left precisely where he was before the enactment of the statute.

The inventories, bond, etc., are required to insure that he will properly administer his trust and do the precise things which he was previously required to do.

Before the death of the partner the firm had the same power to secure and prefer creditors possessed by individual debtors. In the case of *Emerson v. Senter*, *supra*, it is held by the Supreme Court of the United States, that, in the absence of a statute forbidding it, a surviving partner has the same right, and our statute does not forbid it.

The circuit court erred in sustaining the demurrer to the complaint.

Judgment reversed, with instructions to the circuit court to proceed in accordance with this opinion.

Filed April 29, 1891.

Loy v. Loy.

No. 14,922.

LOY v. LOY.

HUSBAND AND WIFE.—Desertion by Husband.—Right of Wife to Crops Grown on Husband's Land.—Where a husband deserts his wife and children, leaving them without support, the wife may cause the land left in her possession to be cultivated during his absence for the support of herself and children, and her rights in the crop are superior to the rights of a chattel mortgagee of the husband with notice of all the facts.

From the Hendricks Circuit Court.

J. L. Clark and — *McQuown*, for appellant.

L. M. Campbell, for appellee.

MILLER, J.—This was an action brought by the appellant to enjoin the appellee from using or removing a lot of corn.

The complaint avers that Amos D. Loy, on the 10th day of September, 1888, executed to the plaintiff a chattel mortgage on about thirty acres of growing corn, and other personal property, to secure the payment of certain notes executed by said Amos D. to the plaintiff; that by the terms of the mortgage, and by reason of the failure of the mortgagor to pay the notes therein mentioned, at maturity, the plaintiff took possession of the mortgaged property and became the absolute owner thereof; that the defendant has cut up, and placed in shocks, four acres of the corn, and is proceeding to remove portions of the same, and to feed it to stock.

To this complaint the defendant answered in two paragraphs: 1st. A general denial. 2d. That she was, and for nineteen years had been, the wife of the mortgagor, Amos D. Loy; that in March, 1888, said Amos deserted the defendant and their four minor children, and expressly relinquished his claim to the services of his children; that since that time he has failed to make any provision for the support of his wife and children, but left them destitute and liable to suf-

Loy v. Loy.

fer; that thereupon the defendant procured her sons to plant and cultivate the crop of corn in controversy for her and their support, and that the same constitutes her and their sole dependence for subsistence; that the corn was raised on the family homestead, where she and her children lived together as one family; that she has at all times had possession of the corn, and that the plaintiff had, at the time of the execution of the mortgage, knowledge of all these facts.

A demurrer was overruled to this paragraph of answer, and the action of the court in so doing is assigned as error.

No authority has been cited, and we have been unable to find any, directly bearing upon the question of law involved.

The law places no restriction, in the interest of the wife, upon the power of husband to dispose of his personal estate. *Pond v. Sweetser*, 85 Ind. 144.

That the husband is under legal obligation to support his wife, unless she has forfeited her right, or waived it, whether they are living together or apart, is so well established that it would be useless to cite authorities in support of the proposition.

The common law remedies by which the wife could enforce her right by application of the rules of agency in binding the credit of the husband for the wife's necessities have been greatly enlarged by various statutes, giving her in addition the direct remedies by suit for alimony and maintenance. The purpose in the enactment of these statutes has not been to curtail or limit the rights and remedies of the wife, whose husband has absconded, but to enlarge and make them more efficient. A husband who wrongfully abandons, and refuses to support his wife and family, not only subjects himself to the various civil and criminal penalties provided by legislative enactment, but he impliedly clothes her with authority to feed and clothe herself and children by the ordinary use and consumption of the property left in her possession, and, to a limited extent, to exercise such authority and control

Loy v. Loy.

over his property and business as may be necessary for its preservation and the support of herself and children.

It has been held that if the wife is entirely unprovided for by her husband, she may sell such of his personal property as will supply her necessities. *Ahern v. Easterby*, 42 Conn. 546.

When a husband and father abdicates his position in the family, the law will not require his family to starve or go unclothed, or his fields to stand uncultivated, for want of authority in his wife to take his place in the management of affairs.

The Legislature has recognized the agency of the wife by permitting her, in his absence, to claim his property as exempt from execution. Section 715, R. S. 1881.

In our opinion, the appellee had the right, under the circumstances set forth in the complaint, to cause the land left in her possession to be cultivated during his absence, for her own support and that of her children; and that after the crop of corn had been raised and matured, she had some rights in the same superior to her husband, or his grantee or mortgagee with notice.

That she was entitled to hold and use so much of the crop thus planted and cultivated by her procurement as was necessary to procure the necessities of life for herself and infant children is unquestionable.

The court did not err in overruling the demurrer to the second paragraph of answer.

The appellant contends that there was not sufficient evidence to support the finding and judgment of the court, the claim being made that there was no evidence tending to show that the father had relinquished his claim to the services of his children. We do not regard this as an important element in this case, but are satisfied that little else than the abandonment of the children and their mother need be shown to establish their emancipation.

In *Hollingsworth v. Swedenborg*, 49 Ind. 378, the court

McDonald v. Geisendorff *et al.*

cites with approval this language: "Whilst it is the duty of a father to nourish, support and maintain his minor child, it is equally the duty of such child to obey and serve his father, in all that may be reasonably required of him. These duties are reciprocally binding upon the parties; support and maintenance on the one hand and obedience and service on the other, the one being dependent upon, and compensatory of the other. And, although the general principle is clear and unquestioned, that the father is entitled to the services of his minor child, and to all that such child earns by his labor, yet, it seems to be equally clear, that, as the right of the father to the services of the child is founded upon his duty to support and maintain his child, if he should fail, neglect, or refuse to observe and perform this duty, his right to the services of his child should cease to exist."

We have read the evidence and find that it fully supports the second paragraph of answer.

Judgment affirmed.

Filed April 25, 1891.

No. 15,012.

128 153
149 369

McDONALD v. GEISENDORFF ET AL.

TAXES—*Tax Title.*—*Actions to Quiet Title.*—The remedy afforded by section 6496, R. S. 1881, which provides for actions to quiet title in persons holding tax deeds, belongs to those only who hold such deeds.

SAME.—*Tax Certificate.*—*Lien.*—A pleading by one holding only a tax certificate, which proceeds on the theory that the pleader is entitled to such remedy, is bad, as he is entitled to nothing more than to be protected in the lien transferred to him by the State at the time of his purchase at tax-sale.

PRACTICE.—*Striking Out Pleading.*—*Bill of Exceptions.*—The ruling of the court in striking out a pleading must be saved by a bill of exceptions to present any question on appeal.

From the Noble Circuit Court.

McDonald v. Geisendorff *et al.*

L. W. Welker, for appellant.

W. W. H. McCurdy, for appellees.

COFFEY, J.—This was an action by Daniel A. Richardson against all the parties now before the court, except Sarah Geisendorff, to foreclose a mortgage upon certain described land. The appellant filed an amended cross-complaint against all the parties then before the court, and against the appellee Sarah Geisendorff, in which he alleged, among other things, that on the 8th day of February, 1886, he purchased the land therein described, being part of the land covered by the mortgage in suit, at a tax-sale, and paid therefor the sum of \$12.05; and that, on the 14th day of April, 1887, he paid taxes thereon amounting to \$1.98; that there was due him, prior to February 8, 1888, on his certificate of purchase, the sum of \$19.15, which had not been paid; that on the — day of —, 1888, the appellee McCurdy paid the auditor of Noble county the sum of \$15.25, being \$3.80 less than the amount required to redeem the land from said tax-sale, and that the auditor issued to him a quietus; that, on the 18th day of May, 1888, he presented to the appellee Phillips, who was the auditor of Noble county, the tax certificate issued to him at the sale, and demanded a deed thereon, which the auditor refused to execute.

Prayer that the auditor be required to execute a deed, and that appellant's title to the land be quieted.

To this cross-complaint the appellees, McCurdy, Geisendorff, Geisendorff and Geisendorff, answered, among other things, that they had been the owners in fee of the land described in the cross-complaint for the period of ten years, as tenants in common; that, in the month of January, 1888, they applied to the treasurer of Noble county to redeem said land from the tax-sale named in the cross-complaint; that the treasurer stated to them that the amount necessary to make said redemption was \$16.98, and that they thereupon paid him said amount for the use of the appellant, and re-

McDonald v. Geisendorff *et al.*

ceived from said treasurer a receipt for said sum, and filed the same with the auditor of Noble county, and received from him certificates showing that they had redeemed the land from said tax-sale; that at the time they paid said money they did so in good faith, believing it to be the full sum due the appellant on his certificate; that, if any sum was due appellant over and above the amount paid, it did not exceed \$1.00; that, on the 7th day of June, 1888, they tendered the appellant \$2.50 in discharge of the balance due him, which he refused to accept. The appellees brought said sum of \$2.50 into court for the use of the appellant.

To this answer the court overruled a demurrer.

The appellant replied, admitting the tender of the amount named in the answer, but averring that at the time of such tender there was due to him for redemption money, and for costs in this action a much larger sum, to wit: \$15.

The cross-complaint as to Phillips, the county auditor, was struck out by the court, but the ruling was not saved by a bill of exceptions.

The court made a special finding of facts in the cause, and stated its conclusions of law thereon, to which conclusions of law the appellant excepted.

It is contended by the appellant:

First. That the court erred in overruling the demurrer to the above answers.

Second. That the court erred in its conclusions of law on the facts found.

The objection urged against the answer is, that it is not pleaded as a bar to the further prosecution of the action, and does not aver that the tender included the accrued costs.

The cross-complaint to which it is addressed proceeds upon the theory that the appellant had the right to the remedy provided by section 6496, R. S. 1881. In this he was mistaken. The remedy provided by that section belongs to those only who hold tax-deeds. As the appellant had no deed, he was entitled to nothing more than to be protected

Eller *et al.* v. Evans *et al.*

in the lien transferred to him by the State at the time of his purchase at tax-sale. *Reed v. Earhart*, 88 Ind. 159.

As the cross-complaint was bad, it is unnecessary to inquire into the sufficiency of the answer, as a bad answer is good enough for a bad complaint.

We do not think the court erred in its conclusion of law on the facts found.

While the tax sale was sufficient to transfer to the appellant the lien of the State for taxes, it was not, under the facts found by the court, sufficient to transfer the title to the land. The amount tendered and brought into court exceeded the sum due to the appellant. There is no finding that at the time of the tender there was any costs due from the appellees to the appellant, or that the appellant had incurred any liability for costs which could have been adjudged against the appellees, or either of them.

As no bill of exceptions was filed, no question arises as to the action of the court in striking out the appellant's cross-complaint as to Phillips. *State, ex rel., v. Krug*, 82 Ind. 58; *Rhine v. Morris*, 96 Ind. 81; *Stanton v. State, ex rel.*, 74 Ind. 503.

There is no error in the record.

Judgment affirmed.

McBRIDE, J., took no part in the decision of this cause.

Filed April 25, 1891.

No. 14,987.

ELLER ET AL. v. EVANS ET AL.

PARTITION.—*Decree.*—*Collateral Attack.*—The owner in fee of certain real estate died intestate, leaving a widow and children. In 1855, in a suit for partition of the land, brought by certain of the children against the widow and the remaining children, the common pleas court appointed commissioners to make partition, and upon their report that they had

Eller *et al.* v. Evans *et al.*

assigned to the widow for her dower thirty-eight acres of the land, but were unable to partition the remainder among the children, ordered the sale of the entire tract, subject to the widow's dower. Upon the death of the widow, in 1888, the plaintiffs, heirs of the intestate, sued for partition of the thirty-eight-acre tract sold subject to the widow's dower, claiming that the commissioner's sale ordered by the court was void.

Held, that the court having jurisdiction both of the subject-matter and of the parties, the order of sale was not void, and can not be collaterally attacked.

SAME.—Acquiescence.—Estoppel.—The plaintiffs, having acquiesced in the order of sale more than thirty years, and having received and retained the purchase-money paid for it, are estopped from now claiming any interest in the land as against the purchaser at the sale, and those claiming under them.

From the Warren Circuit Court.

W. L. Rabourn, J. W. Sutton and W. P. Rhodes, for appellants.

J. McCabe and E. F. McCabe, for appellees.

MCBRIDE, J.—This was a suit by the appellants for partition of thirty-eight acres of land in Warren county.

Leonard Eller died in Warren county intestate, May 23d, 1850, the owner in fee of certain lands in that county, including the land in controversy. He left surviving him a widow and eight children. At the October, 1855, term of the common pleas court of that county, certain of said children brought suit against all the remaining children and said widow for partition of said land.

An interlocutory decree was rendered awarding partition, adjudging that said children each owned in fee the undivided one-eighth of said land, and that said widow was entitled to dower therein. The court thereupon appointed commissioners to make partition, who thereafter reported to the court that they had assigned to the widow for her dower the thirty eight acres of land now in controversy, but that they were unable to make partition of said land between said children.

The court then ordered that the entire tract of land of which said Leonard Eller died seized be sold, subject to the dower

Eller et al. v. Evans et al.

thus assigned. A commissioner appointed by the court made the sale accordingly.

The widow died in March, 1888, and this suit is brought by certain of the heirs of Leonard Eller against the remaining heirs, and also against those who claim through the said commissioner's sale.

The heirs of Leonard Eller claim that the order of the common pleas court, directing the sale of the fee in said land, was void in so far as it directed the sale of the thirty-eight acres in which dower had been assigned; that the commissioner's deed conveyed no title to that portion of the land, and that they became entitled to the possession of the same at the death of the widow. They seek to have the thirty-eight acres partitioned among themselves, and ask to have their title thereto quieted as against those claiming title under the purchasers at the commissioner's sale.

The foregoing facts all being shown by the complaint, the circuit court sustained a demurrer to it, on the ground that it did not state facts sufficient to constitute a cause of action.

The common pleas court had jurisdiction of actions for the partition of real estate. 2 G. & H., p. 20, section 5.

The complaint shows that in the partition suit brought in the common pleas court of Warren county, in October, 1855, said widow and all of said heirs were parties. The court therefore had jurisdiction both of the subject-matter and of the parties. It had the power, under the statute, not only to make partition, but to direct the sale of the land when it was shown by the report of the commissioners that it could not be divided without injury.

It can not be said that in making the order to sell, the court directed the sale of any greater interest than the parties owned, for at the time the children owned the fee in all the land, including that assigned as dower.

The death of the widow, while it would give them the right of possession, would not operate to give them any additional title. The order directing the sale of the fee in all

Eller et al. v. Evans et al.

the land, directed the sale of nothing but that which they then owned. We need not inquire or decide whether the order to sell the fee in that part assigned as dower was or was not erroneous. Being made by a court having jurisdiction both of the subject-matter and of the parties, and operating only upon rights which they then actually owned and had submitted to the court for its adjudication, it was not void, and can not be attacked collaterally. This proposition is so well settled by authority that we deem it unnecessary to cite authorities further than to refer to the recent case of *Isbell v. Stewart*, 125 Ind. 112, as bearing upon the question here involved. If the parties wished to attack the order made by the court the attack should have been direct, by motion for a new trial and by appeal.

This necessarily leads to an affirmance of the judgment. It might, however, well be affirmed upon other grounds. It will be presumed that the partition proceedings in the common pleas court were regular, and pursued the usual course, nothing to the contrary being averred in the complaint.

It will, therefore, be presumed that the sale by the commissioner, in 1855, was followed by the distribution among the owners of the fee of the purchase-money. Appellants, therefore, more than thirty years ago, not only acquiesced in the order for the sale of the land, but received and presumably retained and still retain the purchase-money paid for it. This is sufficient to effectually estop them from now claiming any interest in the land as against the purchaser at that sale and those claiming under him.

The judgment is affirmed, with costs.

Filed April 25, 1891.

Joslyn v. The State.

No. 16,040.

JOSLYN v. THE STATE.

192 160
d153 96

CRIMINAL LAW.—*Larceny*.—*Information*.—*Duplicity*.—An information charging in one count the larceny of two distinct articles of personal property belonging to different persons, without alleging that the property of the two owners was stolen at the same time and by the same act, is bad for duplicity.

From the Allen Circuit Court.

S. M. Hench, for appellant.

A. G. Smith, Attorney General, and *J. M. Robinson*, Prosecuting Attorney, for the State.

ELLIOTT, J.—The information charges, in one count, that “the appellant feloniously did steal, take and carry away one cutter bar of the value of ten dollars, and two hundred pounds of iron of the value of five cents per pound, of the personal property of James Gunnison, and one cutter bar of the value of ten dollars, and two hundred pounds of iron of the value of five cents per pound, the personal property of James Parham.”

If the count of the information from which we have quoted is double, it is bad for duplicity. The rule is well settled that duplicity is fatal upon a motion to quash. *Siebert v. State*, 95 Ind. 471 (475); *Stewart v. State*, 111 Ind. 554 (556); *Fahnestock v. State*, 102 Ind. 156; *State v. Weil*, 89 Ind. 286; *Knopf v. State*, 84 Ind. 316.

Whether the pleading is double or not depends upon whether stealing the property of two different persons is *prima facie* one offence, or is two distinct offences. We do not here controvert the doctrine that there may be cases where the larceny of the property belonging to different persons may constitute a single offence, as, for instance, where it is all in one bundle or in one package, for it is unnecessary to do so, inasmuch as in such a case there is a single and indivisible act, and it may be a single crime. *State v.*

Joslyn v. The State.

Nelson, 29 Me. 329; 1 Hale P. C. 531; *Clem v. State*, 42 Ind. 420; *Ben v. State*, 22 Ala. 9. If the information alleged that the property of the two owners was stolen at the same time and by the same act, so that it could be affirmed that there was a single larceny, we should perhaps be able to sustain the information. But the difficulty that arises can not be solved by assuming that there was a single act, unless, as a matter of law, it can be adjudged that the larceny of property belonging to different owners, committed on the same day, constitutes a single crime, for there are no facts alleged tending to show that there was one indivisible offence. As there is only a single count, we are required to decide whether the larceny of property belonging to two different persons can, as matter of law, be considered to constitute one offence, for no more than one offence can be properly charged in one count of an indictment or information, although different offences may be charged in different counts.

It is well known that every larcenous taking is a trespass against the owner. An essential element of the crime of larceny is trespass, although the trespass may be constructive and not actual. Assuming, as we must, that the element of trespass is essential to the crime of larceny, we must ascertain what the implication is where it is charged that there was a trespass against two or more persons. It seems clear to us that the implication is that the trespasses were separate and distinct. If Gunnison had sued the appellant for the trespass, and had alleged that the appellant carried away his, Gunnison's, property and that of Parham also, we suppose it to be plain that Gunnison could not recover the value of Parham's property, for the implication would be that there were distinct causes of action. If this is the implication, then the information is double. We can perceive no escape from this conclusion. We can not infer, for the sake of upholding a conviction of a crime, that what would

Joslyn v. The State.

ordinarily be regarded as two distinct trespasses, is, in fact, only one. The authorities require the conclusion we have suggested. In the case of *Phillips v. State*, 85 Tenn. 551, the goods belonged to different persons, but were taken on the same night from the same room, and it was held that there were two distinct offences. In speaking of the trespass to the different owners it was said: "The wrong to one of them was no wrong to the other; and if the wrong to each was not a complete crime within itself, there is no wrong at all, because two acts involving the distinct rights and property of different individuals can not be coupled in order to constitute one offence against the law." Possibly the language used is a little too broad; but restricting it to due bounds, nevertheless, the principle declared decides the case against the State. Suppose, for the sake of illustration, that the appellant had been convicted of stealing Gunnison's property, and was subsequently indicted for stealing Parham's property, would the conviction be *prima facie* a bar to the second prosecution? To our minds it is clear that it would not be, although it is possible that if it appeared that the property of both owners was stolen in a single and indivisible act, the first conviction would bar further prosecution. If the first prosecution would not be a bar, and we think it would not be, it must be for the reason that *prima facie* there are two offences.

Resuming our consideration of the authorities, we quote from the case of *Morton v. State*, 1 Lea (Tenn.), 498, the following: "Every larceny includes a trespass to the person or property of the owner of the thing stolen. A larceny of the property of O'Brien was no trespass to the person or property of Corbitt, and *vice versa*." In the case of *State v. Thurston*, 2 McMullan (S. C.), 382, it was held that taking cotton belonging to three persons constituted three distinct offences. The doctrine is carried much further—possibly too far—in *Commonwealth v. Andrews*, 2 Mass. 409, for it was there held that the offences were distinct, although there was a single

Joslyn v. The State.

act. But well-reasoned cases in California go to the same length. *People v. Alibez*, 49 Cal. 452; *People v. Wasson*, 65 Cal. 138; *People v. Yoakum*, 53 Cal. 566. The common law rule as stated in *Nelson v. State*, 8 N. H. 163, is this: "If one steal at the same time the goods of A. and also other goods of B., there are two distinct larcenies. 8 East Crown Law, 521." Some of the cases say that the rule is that "the plea of *autre fois acquit* or *convict* is sufficient, whenever the proof shows the second case to be the same transaction with the first." *Copenhagen v. State*, 14 Ga. 8; *Holt v. State*, 38 Ga. 187. Without going into an examination of the decisions of other courts in detail, we cite, as sustaining the doctrine that unless the transaction is indivisible and the same the offences are distinct, *Vaughan v. Commonwealth*, 2 Va. Cases, 273; *Teat v. State*, 53 Miss. 439; *Burns v. People*, 1 Parker Crim. C. 182; *People v. Saunders*, 4 Parker Crim. C. 196; *Regina v. Morris*, 10 Cox C. C. 480.

It is difficult to reconcile the doctrine of our later cases with that asserted in *Clem v. State*, *supra*, but it is not important that we should attempt to do so in this instance, nor is it necessary to determine which is the better doctrine, for, assuming that the doctrine of *Clem v. State*, *supra*, is sound, it in no wise impeaches our conclusion; for it is there held that the crime must be the product of one and the same act, and, conceding this, the information before us is bad.

In the case of *State v. Elder*, 65 Ind. 282, it was said: "When the same facts constitute two or more offences, wherein the lesser offence is not necessarily involved in the greater, and when the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecution to a final judgment will not be a bar to the second, although the offences were both committed at the same time and by the same act." Much to the same effect is the reasoning in *State v. Huttabough*, 66 Ind. 223, and *Siebert v. State*, *supra*. See, also, *Davidson v. State*, 99 Ind. 366.

Bingham *et al.* v. Walk *et al.*

We know that there are decisions hostile to the conclusion we here assert, but we are satisfied that our conclusion is right on principle, and sustained by the decided weight of authority.

It may not be amiss to say that we intimate no opinion as to what the rule should be upon a motion in arrest, for here the attack was made upon the information promptly, and the State had ample time and opportunity to cure the error.

Judgment reversed.

Filed April 29, 1891.

128	164
131	348

128	164
151	516

128	164
157	431

128	164
161	225

128	164
164	451

No. 15,662.

BINGHAM ET AL. v. WALK ET AL.

ATTORNEY AND CLIENT.—*Privileged Communications.*—Communications made by an agent of the client to his attorney concerning the client's business are not privileged communications as between the agent and the attorney, and, with the client's consent, the attorney may testify to them.

EVIDENCE.—*Res Gestæ.*—Where the question at issue is whether the husband or the wife was a member of a partnership, conversations between the wife and a member of the partnership relating to the management of the business are admissible as part of the *res gestæ*.

SUPREME COURT.—*Conflicting Evidence.*—Where the evidence is conflicting the Supreme Court will not pass upon its sufficiency.

PRACTICE.—*Appeal.*—*Sufficiency of Complaint.*—Where some of the defendants file a cross-complaint alleging the same facts alleged in the complaint, and asking the same relief, they can not upon appealing from a judgment in favor of the other defendants question the sufficiency of the complaint.

SAME.—Where evidence is objected to on the ground of its incompetency and immateriality, an objection can not be made on appeal on account of the incompetency of the witness.

SAME.—*Objections to Evidence.*—Only such objections to the admission of evidence as are made in the court below will be considered on appeal.

NEW TRIAL.—*Surprise.*—*Testimony of Adverse Party's Witness.*—It is no cause for a new trial that the unsuccessful party was surprised by the testimony of a witness called by his adversary.

Bingham *et al.* v. Walk *et al.*

SAME.—Motion.—Counter-Affidavits.—Counter-affidavits controverting the facts contained in affidavits filed in support of a motion for a new trial may be received.

From the Marion Circuit Court.

F. Knefler and *J. S. Berryhill*, for appellants.

W. W. Herod and *W. P. Herod*, for appellees.

MILLER, J.—This case was brought by Henry H. McGaffey, as administrator of the estate of Wheelock P. Bingham, deceased, against Julia C. Walk, Harriet A. Bingham, widow, and George M. Bingham and others, children of Wheelock P. Bingham, to determine the right of property of a jewelry store in the city of Indianapolis.

The complaint avers that the defendant Walk and the decedent were equal partners in the jewelry store, which was of the value of more than thirty thousand dollars; that, after his appointment and qualification, the administrator called upon the defendant Walk and demanded of him an accounting of the partnership and firm affairs; that, upon such demand, the defendant Walk refused to account or to settle the business of the firm as surviving partner, asserting that Wheelock P. Bingham was not, at the time of his death, and never had been, his partner in said business; that the estate of the deceased had no interest in the assets of the firm, but that the defendant Harriet A. Bingham was, and always had been, his partner in business.

The defendants Walk and Hattie A. Bingham answered jointly, by a general denial of the complaint, and, in a second paragraph, alleged that they were, and always had been, partners, composing the firm of "Bingham & Walk," and Wheelock P. Bingham was not a partner in the firm, and had no interest therein.

The appellants George M. Bingham and other children of Wheelock P. Bingham filed a general denial to the complaint, and also a cross-action against Walk and Harriet A. Bingham, charging that their father was a full partner in

Bingham et al. v. Walk et al.

the business with Walk; that he refused to settle as a surviving partner, and asking for the appointment of a receiver to wind up the business of the firm and distribute the proceeds according to law.

The cause was submitted to the court for trial upon the complaint and cross-actions, and resulted in a finding and judgment for the appellees Walk and Harriet A. Bingham.

The administrator of Wheelock P. Bingham refuses to join in this appeal.

The sufficiency of the complaint is challenged by an assignment of error in this court; the objection being made that it does not show that Wheelock P. Bingham was indebted at the time of his death, so as to require any portion of the assets of the partnership to be applied to their liquidation, and that therefore the administrator was not an interested party within the meaning of section 6050, R. S. 1881.

The administrator and the children of the deceased were not, in interest, adverse parties.

In their pleadings they allege, substantially, the same facts and ask the same relief. They were alike unsuccessful in the litigation.

The appellees were their adversaries, and, as between them, the litigation was upon their cross-actions. We could not reverse a judgment in favor of the appellees because some of the pleadings of their adversaries are insufficient. We do not, therefore, pass upon the sufficiency of the complaint as a cause of action.

One of the causes for a new trial, the overruling of which is assigned as error, was the alleged insufficiency of the evidence to sustain the finding of the court. The other cause relates to the admission of evidence over the objection of the appellants.

The evidence, as it comes to us in the record, is very conflicting, and we can not, therefore, under the well established rules of this court, pass upon its sufficiency.

Bingham et al. v. Walk et al.

A correct understanding of the ruling of the court upon the admission of evidence can not be had without a review of portions of the testimony introduced.

The evidence showed, without contradiction, the following facts:

That W. P. Bingham was a practical jeweler of large acquaintance, who had been unfortunate in business, and in the year 1877 had been adjudged a bankrupt; that prior to receiving his discharge as a bankrupt, a partnership was formed under the firm name of Bingham, Walk & Mayhew, for the purchase of a stock of jewelry; that the appellee Julius C. Walk and one James N. Mayhew were two of the members of the firm. A stock of jewelry was purchased at the price of \$16,187, of which \$8,500 was paid in cash at the time of the purchase, and notes given for the residue, which were afterwards paid out of the earnings of the business; that this sum of \$8,500 was made up as follows: Walk borrowed for himself and Bingham the sum of \$3,000, being \$1,500 for each; Mayhew, who had negotiated the trade, put in \$5,500, but was to, and afterwards did, draw out \$1,000 of that sum; that shortly before the formation of the partnership Wheelock P. Bingham married the appellee Mrs. Bingham, she being his second wife, and being worth several thousand dollars in her own right; that the appellants are the children of Bingham by a former wife; that the money borrowed by Walk was loaned upon security furnished by him, without assistance from either Bingham or his wife; that prior to the purchase of the stock of jewelry, Mrs. Bingham made an attempt to borrow money upon some collateral she held, but was unsuccessful, and, so far as the evidence shows, paid nothing into the firm, but that afterwards she paid \$600 on the \$1,500 note executed by her husband for the money that formed part of the cash payment for the stock; that for a part of the deferred payment on the stock of goods, a note for \$2,000 was signed by W. P. Bingham, Walk and Mayhew individually, and the payment of the same secured by a mort-

Bingham et al. v. Walk et al.

gage on the individual property of Mayhew. The business was profitable from the start, all goods being paid for as purchased, and the notes executed in the purchase of the stock paid at or before they matured; that by agreement each member of the firm drew out as salary \$25 per week, which was afterwards increased to \$35 and then to \$50; that about five years after the formation of the partnership Bingham and Walk purchased of Mayhew his third interest in the firm for \$18,000, paying him in cash \$12,000 and executing a note for \$6,000, due three years after date, signed by W. P. Bingham and Julius C. Walk, and secured by a second mortgage on the separate real estate of Mrs. Bingham; that the name of W. P. Bingham was given as the member of the firm on the business cards of Bingham, Walk & Mayhew, also on their letter-heads and bills; that he was also given as a member of the firms of Bingham, Walk & Mayhew, and of Bingham & Walk, in the city directory each year during the existence of these firms; that upon the dissolution of the firm of Bingham, Walk & Mayhew, caused by the retirement of Mayhew, the notice of dissolution published in the daily papers were signed by W. P. Bingham, as a member of the firm; that Bingham was the principal manager in the business of both firms, made most of the purchases of goods, and had charge of the books; that the salary account of the Bingham member of the firms was kept in the name of W. P. Bingham on the firm books; that during a portion of the time a small account was kept with Mrs. Bingham, and in her name, consisting mostly in charges for goods purchased by her in the store; that the administrator of the estate was selected by Walk and Mrs. Bingham, who renounced her right to administer in his favor.

The evidence about which there was a conflict, was in the testimony of Mayhew, who testified that Wheelock P. Bingham was a partner while he was a member of the firm, and that Mrs. Bingham had nothing to do with the partnership. Also, in the testimony of Albert G. Orens, who kept the

Bingham et al. v. Walk et al.

books of the firm until the death of Bingham, who corroborated Mayhew on the one side; and the evidence of Walk and Mrs. Bingham on the other, who testified that Bingham never had any interest in the business, but acted throughout as a manager of Mrs. Bingham's interests therein; that his name was used in the firm upon the supposition that it would, on account of his wide acquaintance, help the business.

They were corroborated by the testimony of Charles A. Shotwell, who testified to having heard Mr. and Mrs. Bingham talk of their business relations; and to some extent by the evidence of R. H. Bingham, a brother of the deceased, who testified that his brother told him on several occasions that Mrs. Bingham was the Bingham of the firm; that she furnished the money that went into the partnership on the Bingham account, and that he, Bingham, was not worth a dollar.

It also appeared, without dispute, that at the inception of the partnership of Bingham, Walk & Mayhew, articles of co-partnership were drawn up and kept for many years in the safe, but were never signed. They had disappeared some time prior to the trial, but it does not appear just when, or what became of them. The evidence on the subject all tends to show that they were drawn up by some member of the firm of Rooker & Norton. This agreement, if it could have been found, would have furnished important, if not controlling, evidence upon the question in dispute; and, in the absence of the writing, it was of the utmost importance to ascertain which one of the Bingham was therein designated as a member of the firm. Upon this subject Mayhew testified that W. P. Bingham was the party named, and Walk was equally positive that it was Mrs. Bingham.

The last witness placed upon the stand, by the appellees, was Judge Norton, formerly a member of the firm of Rooker & Norton, who during the course of his examination testified as follows:

"Q. You may state, Judge Norton, whether Mrs. Bingham

Bingham et al. v. Walk et al.

and Mr. Walk and Mr. Mayhew called upon the firm of Rooker & Norton to have articles of co-partnership prepared? A. I do not think that our firm, or any firm that I was connected with, drew any articles of partnership for these parties. I think whatever was done was done for Mr. Bingham when he was a client of ours. I think there was an article of co-partnership drawn for Mrs. Bingham at Mr. Bingham's request.

"Q. State who were named in those articles as partners? (The court: 'Did you see the instrument yourself?' The witness: 'I think I did.') A. Mrs. Bingham, Mr. Walk and Mr. Mayhew.

"Q. What was the style of the firm? A. Bingham, Walk & Mayhew.

"Q. Who did Mr. Bingham pretend to represent in having those articles drawn, and in the management of the business created by the partnership? A. My memory is that this was done for Mr. Bingham himself, and on that ground I decline to say anything about it, unless the court requires me to. I think all the work was done for Mr. Bingham himself. He was a client of ours, all the talk was with Mr. Bingham."

At this point the court entered into an examination of the witness with reference to his competency to testify, during the course of which the witness said that Mr. Bingham came alone; that they had been his attorneys in the bankruptcy proceedings, and after that was through this arrangement came up, and he, Bingham, had prepared whatever was prepared, and that he paid for it.

After this examination, the witness, over the objection of the appellants, testified that Mrs. Bingham was named in the article as one of the partners in the firm of Bingham, Walk & Mayhew, and that it was therein provided that W. P. Bingham should represent her interest, but that he was to have no monied interest in the firm on his own account.

We are urgently called upon to reverse this cause because

Bingham *et al.* v. Walk *et al.*

of the admission of this evidence. We have given this question a careful examination and have arrived at the conclusion that the court did not err in its admission.

It is provided by statute, section 497, R. S. 1881, "The following persons shall not be competent witnesses:

"*Third.* Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases."

This is substantially a re-enactment of the provisions of the common law, and should be examined in the light of the common law authorities.

When the witness was placed upon the stand the presumption is that he was called upon to tell the whole truth. The burden was upon the party who sought to have a portion of his testimony suppressed because they were privileged communications, to show such incompetency. The fact that would make his statements incompetent must be proved. The only way this could be done was by an examination of the witness himself, which was done. In order to make the witness incompetent it was necessary to show that the relation of attorney and client existed between him and W. P. Bingham, and that the communication was made by the client for the purpose of obtaining counsel, advice or direction in regard to his legal rights. The facts elicited by the examination show that the conference related to the legal rights and business of Harriet A. Bingham, rather than that of her husband.

The relation of attorney and client existed between her and the witness, rather than between her agent and the witness. It is not necessary that a party shall be bodily present in the office of an attorney in order to employ him. An attorney may be employed by agent, and all consultations carried on between the attorney and client through such agent. Mrs. Bingham could, if she desired, have objected to the competency of the witness, and insisted that all communication between her and her attorney was privileged,

Bingham *et al.* v. Walk *et al.*

whether they were carried on through her agent, in person, or by letter. There was no community of interest between the husband and wife in the transaction in which the attorney was engaged, and about which he was called to testify.

In *Shean v. Philips*, 1 F. & F. 449, the action was against a trustee for money received by him under the trust. An attorney was called to testify to communications made to him by the trustee concerning certain of the claims, and as to his supposed lien. The evidence was objected to as privileged. The court held the witness competent, on the sole ground that the employment having been made to collect money due the trust, the witness was the attorney of the *cestui que trust*, and not of the trustee. To the same effect, see *Talbot v. Marshfield*, 2 Dr. & Sm. 549.

Had the preliminary examination of the witness brought out anything indicating that the deceased, at the time when the article was drawn, was consulting or advising with the attorneys on his own account, or for his own benefit, a different question would arise.

Complaint is made of the admission of portions of the testimony of Julius C. Walk, in which he detailed conversations between himself and Mrs. Bingham relating to the management and control of the store, portions of the conversations not being shown to be within the presence of her husband.

It was competent for the appellees to show any conduct or acts of Mrs. Bingham that tended to show her exercise of control or authority in the partnership as part of the *res gestæ*. The record discloses the fact that the court admitted the evidence as a circumstance showing her participation in the firm business.

During the examination of Mrs. Bingham she was permitted to testify to matters occurring during the lifetime of her husband. Objections were made to her testimony from time to time, on the ground of its incompetency and immateriality. Toward the close of her evidence the objection was

Bingham *et al.* v. Walk *et al.*

made for the first time that she was incompetent under the statute. The court at once sustained the objection to such evidence, and it was thereafter excluded. A motion was then made to strike out the evidence she had given prior to the making of the objection for her incompetency, and this motion was overruled.

It is claimed by the appellants that the objection to the evidence was obvious, within the rule laid down in *Kinsman v. State*, 77 Ind. 132, and *Underwood v. Linton*, 54 Ind. 468, so as to require its exclusion without further objection.

The only objections to the testimony of this witness which are presented in this court relate to the incompetency of the witness to testify. If the witness was competent, the evidence was admissible. The appellants did not object, in the trial court, to the evidence, the admission of which is complained of, on account of the incompetency of the witness, but assigned special reasons for its exclusion, entirely consistent with the competency of the witness to testify, and such as were well calculated to mislead the court and the adverse party as to the real grounds of their objection to the evidence.

To permit the appellant to shift their grounds of objection would be grossly unfair and contrary to the rules established by this court. *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196 ; *Fitzpatrick v. Papa*, 89 Ind. 17.

The evidence having been admitted without objection to the competency of the witness, it was not error to overrule the motion to strike out the evidence. *Brown v. Owen*, 94 Ind. 31.

One of the causes for which the appellants asked a new trial was the claim that appellants' attorneys were surprised by the testimony of the attorney for the administrator, and mislead in their preparation of the cause for trial. After reading the affidavits filed in support of this cause, we are not disposed to call in question the genuine nature of their surprise, but it does not appear that they were placed in any

worse position than they would have been if they had been advised in advance of the nature of his testimony. In addition to this, the witness was placed upon the stand by their adversaries, and the evidence was competent under the issues; such being the case, the appellants were not entitled to a new trial on the ground of surprise. *Gardner v. State, ex rel.*, 94 Ind. 489.

It was not error to receive and consider affidavits filed by the appellees controverting the facts contained in the affidavits filed in support of the motion for a new trial. *Mitchell v. Chambers*, 55 Ind. 289; *Hamm v. Romine*, 98 Ind. 77.

We find no error in the record for which this case can be reversed, and we are, therefore, compelled to affirm the judgment, with costs.

Judgment affirmed.

ELLIOTT, J., did not sit in this case.

Filed April 28, 1891.

128	174
130	206
128	174
144	276

No. 16,074.

ENGLISH v. DICKEY.

ELECTIONS.—Contest.—Limitation of Time for Trial Before County Commissioners.—Continuance.—The provision of section 4761, R. S. 1881, limiting to twenty days the duration of a session of the board of county commissioners when convened to try a contested election case, is mandatory, and the limitation applies to the entire proceeding, and not merely to the hearing of testimony. Where, therefore, the contestor before the expiration of the term obtains a postponement which carries the cause beyond the time limited, he thereby discontinues his contest.

SAME.—Computation of Time.—Section 1280, R. S. 1881, applies in computing the time, and Sundays are excluded only as provided by that section.

SAME.—Discontinuance.—Costs.—Where an election case is discontinued the costs should be taxed against the contestant. Section 4765, R. S. 1881.

English v. Dickey.

From the Decatur Circuit Court.

J. S. Scobey, for appellant.

S. A. Bonner, for appellee.

MCBRIDE, J.—The appellant and the appellee were opposing candidates for the office of sheriff of Decatur county, at the general election in November, 1890. The board of canvassers declared the appellee elected, and thereupon the appellant instituted this proceeding to contest the election. The necessary preliminary steps having been taken, the auditor of the county issued and caused to be served on the board of county commissioners a notice convening them in special session on the 4th day of December, 1890, to try such proceeding, and also issued and caused the service on the contestee of notice, as required by section 4760, R. S. 1881. At the time fixed the board of commissioners convened, the parties, contestor and contestee, appeared in person and by counsel, and such steps were taken from time to time as carried the cause to the 22d day of December, 1890, which time was set for the commencement of the trial proper. On the 22d day of December, 1890, the parties appeared, and the contestor moved for a postponement of the cause to Friday, December 26th, 1890, which motion was sustained.

The record entry of this motion, and of the order postponing the cause, is as follows :

“Comes now the contestor by his attorney, and in person, and asks that the hearing of the cause at issue be postponed until Friday, December 26th, 1890, to which the contestee interposes no objections, and which was accordingly done.”

On the 26th day of December, 1890, the board again convened, the parties appeared, and the contestee moved the court to discontinue the cause for the reason that more than twenty days had elapsed since the board of commissioners were called to try and determine the same.

The board sustained the motion. The contestor thereupon appealed to the circuit court. In the circuit court the

English v. Dickey.

motion to discontinue was renewed, and sustained by the court. The court thereupon rendered judgment confirming the contestee in his office, and against the contestor for costs.

The contestor, in his appeal to this court, assails the action of the court below upon two grounds:

1st. That the court erred in sustaining the motion to discontinue.

2d. That the court erred in rendering judgment against the appellant for costs.

Whether the motion to discontinue the cause was rightly sustained or not depends upon the construction to be given to sections 4760 and 4761, R. S. 1881. The two sections in question are as follows:

"4760. When such statement is filed with the auditor, he shall issue a notice to the board of county commissioners to meet at the court-house at a designated time, not less than ten nor more than twenty days thereafter, to try such contested election, and shall issue a notice to the contestee to appear at the time and place specified in the notice to the commissioners; which, with a copy of such statement, shall be delivered to the sheriff of the county, who shall, within five days thereafter, serve the same on the contestee, by delivering to him a copy of such notice and statement, or leaving a copy thereof at his last usual place of residence.

"4761. The auditor, at the request of either party, shall issue subpoenas, which shall be served by the sheriff. Such board of commissioners shall try and determine such contest; and shall have power to compel the attendance of witnesses, to swear and examine the same, to punish contempts as other courts, to adjourn or continue the trial from time to time, not exceeding twenty days altogether; to make the necessary orders for the payment of costs, and to coerce the payment of the same, and shall be governed in such trial by the rules of law obtaining in circuit courts. And if it be proved that any other person than the contestee has the

English v. Dickey.

highest number of legal votes, such board shall declare such person elected, and certify the same to the proper officer."

The controversy between the parties is over the twenty-day limitation contained in section 4761. Appellant's position is that it is not an absolute limitation, but is merely directory, and applies solely to the trial proper, after the cause has been submitted and the parties have commenced the introduction of testimony; while the appellee contends that it is mandatory, is an absolute limitation, and embraces the entire proceeding, beginning with the day when the board is convened and organized to enter upon the investigation, and that when twenty days have elapsed the board has no longer jurisdiction to proceed. But little authority has been cited bearing upon this question, and we are inclined to think the authorities are somewhat meagre; indeed, we not only know of no case wherein the precise question has been decided, but no authority has come to our attention wherein the questions decided have sufficient analogy to make them of much value as authority, except as they serve to indicate the rule by which to construe the statute. The policy of the law seems to be to compel prompt action in hearing and disposing of contested elections.

The learned author of McCrary on Elections places much emphasis on this. He says: "A statutory provision requiring notice of contest to be given within a given time, from the date of the official count, or from the declaration of the result, or the issuing of the certificate of election or the like, is peremptory, and the time can not be enlarged. * * * And it may be added that there is the strongest reason for enforcing this rule most rigidly in cases of contested elections, because promptness in commencing and prosecuting the proceedings is of the utmost importance, to the end that a decision may be reached before the term has wholly, or in great part, expired." Section 392.

Again: "The courts should require the parties to speed

English v. Dickey.

the cause, so that the official term which is in dispute may not expire, either in whole or in large part, before the final decision is reached." Section 396.

Again: "There is, however, a very strong reason for requiring any such amendment to be made instantler, and for bringing an election case to a prompt and speedy trial and determination, and it is this: The subject-matter of the controversy is daily growing less, and of less importance and value. The office is usually for a short term of one or perhaps several years only, and if the 'law's delays' are to be allowed in these as in other cases, the term would often expire before a decision could be reached." Section 407.

Again: "As we have already seen, there are strong reasons for requiring the parties to an election contest to use great diligence in preparing for an early trial." Section 408; of similar tenor is section 421.

The case of *Bull v. Southwick*, 2 N. M. 321, was an election contest. The statute limited the time within which answers should be filed. Answers were filed within the time limited, but afterward, and after the expiration of the time limited, the contestee asked leave to file additional answers. The court said:

"It is also my opinion that the very object of the statute, in regard to the pleadings and practice in contested election cases, is to afford, and at the same time to compel the observance of, a speedy mode for conducting and terminating such cases. * * * These statutory provisions, as to the time of filing and serving the notice of contest, answer and reply, are in effect statutes of limitation, taking from the judge all discretion as to extending the time. In my opinion this is one of the most salutary of our statutory laws. Experience has demonstrated that without some such compulsory mode as to the time of making up issues and their trial in contested election cases, subterfuges and delays might, and would be successfully resorted to, so that a final

English v. Dickey.

determination could not be reached before the term of office would expire."

This case is followed, and its interpretation of the statute is approved, in *Vigil v. Pradt* (N. M.), 20 Pacific Reporter, 795.

These authorities may aid us in determining the legislative intent, as it will be presumed the law-making power, in the enactment of a given statute, had in view settled rules of construction, and intended that it should be construed in the light and line of the settled and uniform policy of the law as relating to the subject-matter of the statute in question. Sutherland Statutory Construction, sections 287-289, *et seq.*, and section 333.

We conclude, therefore, that the Legislature intended by the limitation to compel a speedy determination of cases of this character.

It is a part of the common experience of those connected with courts, of which we must take notice, that the delays of litigation as a rule precede the trial proper of causes, and that after a cause is submitted, and the hearing of testimony commenced, it usually proceeds without interruption. It is before that time that the party desirous of delay employs his arts. If, therefore, the Legislature intended by this provision of the statute to prevent delay, it is improbable that they would enact a time limitation applying only to that part of the procedure least liable to abuse by delay. If it was intended that the limitation should apply to only a portion of the procedure, we think it would probably have been applied to the steps preceding that time.

In our opinion it was the intention of the Legislature that the entire time given to the consideration of a contested election case by the board of county commissioners should be twenty days altogether. They are notified by the auditor to meet in special session for that purpose, and the limitation is intended to indicate the entire length of the special session which they may thus hold. The notice issued to them is that

English v. Dickey.

they meet at a designated time "to try such contested election."

Convened and organized in obedience to such notice, they constitute a special tribunal, having no authority except to try and decide that particular case, and within the meaning of the statute the trial commences as soon as they are convened and organized, and the parties appear before them. If the limitation applies only to the actual hearing of testimony, almost the last act in the drama, their session may be protracted indefinitely. This may be done, not necessarily by reason of any indifference or desire for delay on the part of the board, but the skill and ingenuity of counsel, by the use of dilatory practices, may find it possible to secure such delays as would indefinitely prolong the proceeding. If the limitation does not apply to the entire proceeding, there is no limit fixed by the statute for the length of the session of such tribunal. This would be of itself so unusual and exceptional that unless forced to it we could not adopt such a construction of the statute. The board of county commissioners, convened for any other purpose, have the limit of their sessions clearly fixed. Even the courts of record of the State, courts having general jurisdiction, all have fixed terms, and the circumstances under which they may continue in session beyond the time fixed are clearly specified.

Section 284, Elliott's Supplement, provides as follows: "That if at the expiration of the time fixed by law for the continuance of the term of any court the trial of any cause shall be progressing, said court may continue its sitting beyond such time, and require the attendance of the jury and witnesses, and do, transact and enforce all other matters which shall be necessary for the determination of such cause; and in such case, the term of said court shall not be deemed to be ended until the cause shall have been fully disposed of by the court."

While not deciding the question, because not necessary to a decision of this case, it is possible that if the trial of a

English v. Dickey.

contested election case was progressing at the expiration of the twenty days, this statute might apply, and operate to extend the term until it could be finally disposed of. Such a continuance, however, which may be called a continuance or extension of the term by necessity, would be a very different thing from that which was attempted in this case. Here, a special tribunal created and convened for a special purpose, with the period of its duration limited to twenty days, was convened, and entered upon the discharge of its duties on the 4th day of December. On the 22d day of December, two days before its existence must terminate by operation of law, the party at whose instance it was convened, who invoked its creation that it might adjudicate upon his rights, asks that the cause may be continued two days beyond the legal limit of the existence of the tribunal. His request is granted, and an order of that character is made continuing the cause to the 26th day of December. When that time arrives, the court no longer exists. It had ceased to exist two days before, and the law had made no provision for its resuscitation. It was no longer in the power of the parties, even by agreement, to give it life and again clothe it with jurisdiction.

When the board again assumed to meet, on the 26th day of December, it had no legal existence as a court for the hearing of that cause, and no motion to discontinue the cause was necessary. There was nothing to discontinue, as the cause died with the court. What the effect of an order continuing the cause to a day beyond the term would be, if made by the court, over the objection of the contestor, we need not consider, as no such question is before us. What we do decide, however, is, that when the contestor himself, before the expiration of the term, without assigning any reason therefor, voluntarily asks and obtains a postponement which carries the cause two days beyond the time when the term would end by operation of law, he thereby discontinues his contest. Appellant insists, however, that if the

Tarkington *et al.* v. Purvis.

limitation of twenty days is to apply to the entire term, in the computation of the time, Sundays are to be excluded. He cites no authority in support of this proposition, and we know of none. The rule for the computation of time in such cases is fixed by section 1280, R. S. 1881, and is, that the time shall be computed by excluding the first day and including the last, and if the last day be Sunday it shall be excluded. This, of course, includes intervening Sundays.

Appellant also argues that the court had no power to order a discontinuance of the cause, as there is no such thing as a discontinuance known to our practice. Discontinuance and dismissal are synonymous terms. *Thurman v. James*, 48 Mo. 235. It is, however, not at all material what term was used; the case was at an end.

The judgment of the circuit court for costs was in accordance with section 4765, R. S. 1881, and was right.

Judgment affirmed, with costs.

MILLER, J., took no part in the hearing and decision of this cause.

Filed April 28, 1891.

No. 14,530.

TARKINGTON ET AL. v. PURVIS.

CONTRACT.—Rescission.—Waiver.—One who, uninfluenced by the fraud, deals with the property as his own, after having fully discovered that fraud has been practiced upon him in the contract or transaction by or through which he acquired the property, thereby waives his right to rescind.

SAME.—Acts not Amounting to Waiver of Right to Rescind.—Equivocal acts, however, which do not clearly evince a purpose, with complete knowledge of the fraud, to retain the property as his own, will not defeat the right of the person defrauded to rescind. The act must be unequivocal, and must show an election to retain the property after discovering the deceit before the right to rescind is gone.

128	182
134	605
136	317
128	182
148	330
128	182
148	96
6152	238
128	182
155	684

Tarkington *et al.* v. Purvis.

SAME.—Purchaser of Partnership Interest.—Fraud.—Where the purchaser of an interest in a partnership seeks to rescind the contract because of the vendor's misrepresentations, and has fully perfected his right to claim a rescission by tendering back everything that had been received, and by offering to place the fraudulent vendor *in statu quo*, the fact that such purchaser afterwards received money arising from the sale of some of the assets of the firm does not affect his right to compel the rescission, if the property was sold in the course of the firm's business, and the money received was fully accounted for without loss to the vendor.

SAME.—Assignment of Firm Assets.—Repudiation of.—The purchaser of an interest in a partnership who offers to rescind because of the fraud practiced upon him by the partner, does not lose his right of rescission by afterwards joining the other partners in a deed of voluntary assignment of the firm assets, where after the deed was signed and acknowledged, but before it was delivered or recorded, he repudiates the assignment, and does not consent to the delivery of the deed.

TENDER.—Fraud.—Rescission of Contract.—In a suit for rescission on the ground of fraud, no tender of the property received is necessary; it is sufficient for the plaintiff to show that he has preserved the property substantially in the condition in which he received it without intentional or unnecessary change.

VENDOR AND VENDEE.—Bona Fide Purchaser.—Who is not.—The plaintiff, who had exchanged certain real estate for an interest in a partnership, offered to rescind, and perfected his right to do so by giving notice and taking all the necessary steps, because of the misrepresentations of the partner as to the firm assets. Afterwards a conveyance of the real estate was taken from the fraudulent partner by such partner's father in consideration of an antecedent debt.

Held, that such grantee was not an innocent purchaser as against the plaintiff.

PRACTICE.—Special Finding.—Facts Found Unsupported by Evidence.—Motion for New Trial.—Where facts found are not sustained by the evidence, the question is properly presented in the Supreme Court for review by a motion for a new trial, and not by a motion to strike out such parts of the finding as are supposed to be unsupported by the evidence.

From the Howard Circuit Court.

J. W. Cooper, B. F. Harness, J. F. Elliott, L. J. Kirkpatrick, W. E. Niblack and C. E. Cox, for appellants.

C. N. Pollard, M. Bell, W. C. Purdum, J. C. Blacklidge, W. E. Blacklidge, B. C. Moon, J. E. Moore and A. N. Grant, for appellee.

MITCHELL, J.—The material facts in the present case, as

Tarkington et al. v. Purvis.

found by the court, are that in the month of August, 1887, Joseph S. Tarkington exchanged his interest in the firm of T. H. Ellis & Co., dealers in hardware, of which firm he was a member, for certain real estate and \$600 in cash, with Sanford B. Purvis, the latter assuming and agreeing to pay Tarkington's share of the indebtedness of the firm. It is found that Tarkington, in order to induce Purvis to make the trade, made certain false representations concerning the value of the stock and assets of the firm and the amount of the partnership debts, to the effect that the assets of the firm were largely in excess of its liabilities. It appears, from the finding, that the firm was, in fact, in debt, in an amount largely in excess of the value of the partnership assets, so that the interest of Tarkington, at the time the exchange was made, was of no value whatever.

It is found that the exchange was made on the 15th day of August. On the 27th day of the same month Purvis discovered the fraud practiced upon him, and immediately offered to rescind by tendering back all that he had received from Tarkington, and demanding the reconveyance of the real estate which he and his wife had previously conveyed to the latter. He repeated the tender and demand on the 29th day of August, and again on the 1st day of September. It is found that Purvis had received \$341 in cash out of the assets of the firm on the 30th day of August, 1887, and that he offered or tendered the money so received to Tarkington on the 1st day of September following. It is also found that on the same day on which the first demand was made for a rescission of the contract, Tarkington conveyed the real estate which he received in exchange for his interest in the stock of hardware to John Tarkington, his father, the consideration for the conveyance being an antecedent debt of \$4,000, alleged to be due from the son to his father. The latter is a party to this suit.

At the time the elder Tarkington received the conveyance he knew that his son was insolvent, and that he made the

Tarkington *et al.* v. Purvis.

conveyance to put it out of the power of Purvis to recover the property back.

Upon the facts found the court stated conclusions of law upon which a judgment for \$600 against Joseph S. Tarkington, and a decree ordering a rescission of the contract as prayed in the complaint, were entered.

On the appellant's behalf it is insisted that the facts found show that the appellee, after discovering the fraud, converted part of the property to his own use, and otherwise dealt with it in such a manner that his right to rescind was thereby destroyed.

The facts specially found do not afford a basis for the assumption upon which this argument is predicated.

It appears from the facts found that the fraud was discovered on the 27th day of August, 1887, and that immediately upon discovering the deception practiced upon him the appellee took the proper steps to rescind the contract. Subsequently, on the 30th day of August, after another unsuccessful attempt to rescind, he received from the firm assets \$341, and on the next day he again tendered the appellant all that he had received, including the sum above mentioned.

The doctrine is fully established that a contract induced by fraud is only voidable, and if one who has been defrauded, after discovering the deceit, acquiesces in the sale, either by express words or by any unequivocal act, such as treating the property as his own, with an intent to condone the fraud, he will be deemed to have elected to affirm the contract, and he can not afterwards rescind. One who, uninfluenced by the fraud, deals with the property as his own, after having fully discovered that fraud has been practiced upon him in the contract or transaction by or through which he acquired the property, thereby waives his right to rescind. *St. John v. Hendrickson*, 81 Ind. 350; *Higham v. Harris*, 108 Ind. 246; *Worley v. Moore*, 97 Ind. 15; *Doherty v. Bell*, 55 Ind. 205; *Gatling v. Newell*, 9 Ind. 572; *Comparet v. Hedges*, 6

Tarkington *et al.* v. Purvis.

Blackf. 416; *Shaeffer v. Sleade*, 7 Blackf. 178; Benjamin Sales, section 675.

Equivocal acts, however, which do not clearly evince a purpose, with complete knowledge of the fraud, to retain the property as his own, will not defeat the right of the person defrauded to rescind. The act must be unequivocal, and must show an election to retain the property after discovering the deceit before the right to rescind is gone.

In the present case the right to claim a rescission had been fully perfected by the appellee by tendering back everything that had been received, and by offering to place the fraudulent vendor *in statu quo*; that the plaintiff below afterwards received money arising from the sale of some of the assets of the firm, in no way militates against his right to compel the rescission, since it does not appear but that the property was sold in the course of the business of the firm, and the money received was fully accounted for without loss to the appellant. One who has perfected his right to rescind a fraudulent contract can not lose it by merely taking care of the property received, or by preserving it in case it is of a perishable nature, unless what he does is done with the intent to confirm the contract. He is not bound to preserve perishable property; but if he acts in good faith in preventing reasonably apprehended loss, or destruction, and waste of the property, his perfected right of rescission will not be lost in a court of equity if he fairly accounts for the property without loss to the vendor, and places him *in statu quo*, as nearly as may be. *Pierce v. Wilson*, 34 Ala. 596; *Neblett v. Macfarland*, 92 U. S. 101; Wharton Contracts, section 285.

Where subsequent acts are relied on as a defence in a case where fraud is clearly established, it is said the act must stand upon the clearest evidence, and must evince a purpose to waive or forgive the fraud, and must amount to a clear election not to rescind. If what is done is merely for the purpose of saving the plaintiff from further loss, without any purpose to give up whatever right he may have, either at

Tarkington *et al.* v. Purvis.

law or in equity, to rescind, the right of rescission will not be affected. *Montgomery v. Pickering*, 116 Mass. 227; *Morse v. Royal*, 12 Ves. 355 (373).

It also appears that after the offer to rescind, the plaintiff below joined the other partners in a deed of voluntary assignment of the firm assets. Before the deed was delivered to the assignee, or recorded, the plaintiff gave notice that he repudiated the assignment, and that he would not consent to the delivery of the deed. Merely signing and acknowledging the deed, which was never delivered with the plaintiff's consent, did not defeat his right to rescind. So far as the assignment was perfected after the plaintiff below withdrew his consent, it was the act of the other partners, and did not bind the plaintiff.

It is contended that the tender of the \$341 was not made in any manner recognized by the law. We do not inquire whether or not a good technical tender, such as would be recognized in a court of law, was made before the commencement of the suit. The suit being a proceeding in equity to compel a rescission on the ground of fraud, no such tender was necessary. In such a case it is sufficient for the plaintiff to show that he has preserved the property substantially in the condition in which he received it without intentional or unnecessary change. *Shuee v. Shuee*, 100 Ind. 477; *Higham v. Harris*, *supra*; *Montgomery v. Pickering*, *supra*.

Complaint is made that the finding that John Tarkington took the conveyance from his son, Joseph S., with knowledge of the fraudulent purpose of the latter, is not supported by the evidence.

We can not say that the circumstances surrounding the transaction as it is disclosed in the evidence did not justify the finding. Besides, it is conceded that the consideration for the conveyance from Joseph S. Tarkington to his father, was an antecedent debt due from the former to the latter. There was no change in the position of the parties; no right or security of value was surrendered up by the father as a

Tarkington et al. v. Purvis.

consideration for the conveyance from his son. He was therefore not an innocent purchaser as against one holding a prior equity.

While it is true that a precedent debt is a sufficient consideration to support a contract, it is also true that taking a conveyance in consideration of an antecedent debt does not constitute a person who parts with nothing, or in no way changes his attitude, an innocent purchaser, as against one who has a clear and undoubted prior equitable right to the land. *Petry v. Ambrosher*, 100 Ind. 510, and authorities cited; *Boling v. Howell*, 93 Ind. 329.

As between creditors who have no prior equities, a precedent debt will support a conveyance, and, if made without fraud, render it unassailable, but the present is not such a case. The land in dispute, in equity and good conscience, belonged to the appellee, who had given notice and taken all the steps necessary to perfect his right to rescind before the conveyance was made. His equity can not be postponed in favor of one who in no manner changed his position.

Whatever error may have been committed by the court in overruling the appellant's motion to modify the judgment by requiring the plaintiff below to pay the appellant \$341 in money, was corrected by a remittitur of that amount by the appellee.

The appellant, having received \$600 in cash in the trade that was rescinded by the decree of the court, was not entitled to have the \$341, which the appellee received out of the partnership assets, paid back to him. All that he was entitled to was to have that amount deducted from the \$600 received by him. This was done in effect by the remittitur.

The motion to strike out parts of the special finding of facts on the ground that the portions indicated were not supported by the evidence was properly overruled.

When facts found are not sustained by the evidence, the question is properly brought before the court for review by a motion for a new trial, and not by a motion to strike out

Rhodes v. The State.

such parts of the finding as are supposed to be unsupported by the evidence. Possibly, if a special finding were encumbered with facts outside of the issues, or mere statements of evidence, or other extraneous matter, which could have no proper place in a finding of facts, a motion to strike out might be entertained with propriety. But even then the refusal of the court to strike out parts of the special finding would hardly be ground for reversal.

We find no error in the record.

Judgment affirmed, with costs.

Filed Oct. 30, 1890; petition for a rehearing overruled April 30, 1891.

No. 15,661.

RHODES v. THE STATE.

CRIMINAL LAW.—Abortion.—Sufficiency of Indictment.—An indictment for criminal abortion charging that an instrument was feloniously introduced into the womb of a pregnant woman, with the intent to produce a miscarriage, such operation not being necessary to save the woman's life, is sufficient without showing what kind of a wound it produced or what disease it caused.

SAME.—Indictment.—The indictment was not bad because it showed both miscarriage and death.

SAME.—Duplicity.—Charging Accessory.—The indictment was not bad for duplicity because it charged an accessory before the fact as principal.

SAME.—Evidence.—Declarations in Last Illness.—Declarations and exclamations indicative of pain or suffering, made by the woman in her last illness, and not referring to the past, are competent evidence.

SAME.—Witness.—Impeachment.—Where the State is neither surprised nor prejudiced by the testimony of a witness called by it, it may not contradict such witness by evidence of contradictory statements made out of court.

SAME.—Evidence.—It was not competent for the State to show that the woman, upon whom the abortion was produced, was buried at the expense of the county.

SAME.—Instruction.—Reasonable Doubt.—In a case where the evidence of

128	189
131	500
132	60
133	690
128	189
139	624
138	189
140	301
128	189
148	248
151	257
151	258
152	72
128	189
156	278
156	279
128	189
165	96

Rhodes v. The State.

guilt is purely circumstantial an instruction that "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty," is erroneous.

JUROR.—*Competency of.*—*Defective Eyesight.*—A juror whose eyesight is so defective that he can not see the expression of the faces of the witnesses, nor observe their deportment or demeanor, is not competent, especially where various articles illustrative of the testimony are placed before the jury.

SAME.—The defendant was not negligent where his counsel fully examined the juror as to his qualification, and there was nothing in his answers to indicate that his eyesight was defective.

From the Tippecanoe Circuit Court.

W. P. Rhodes, R. P. De Hart, A. L. Kumler and T. F. Gaylord, for appellant.

A. G. Smith, Attorney General, and *G. P. Haywood*, Prosecuting Attorney, for the State.

ELLIOTT, J.—The indictment upon which the appellant was convicted charges him with having feloniously introduced an instrument into the womb of a pregnant woman with the intent to produce a miscarriage.

The appellant's counsel insist that the court erred in overruling the motion to quash the indictment, and allege several objections, but all of them are without substantial merit. It is said that the indictment is bad because it does not show that the woman miscarried or died, but this point is not supported by the record, for it does appear that there was a miscarriage and death. Good pleading does not require any such particularity as counsel insist upon. It is sufficient, in such a case as this, to charge that an instrument was feloniously introduced into the womb of a pregnant woman, without showing what kind of a wound it produced or what disease it caused. Where the felonious use of an instrument is shown, and it appears, as it does here, that the operation was not necessary to save the woman's life, it is not incum-

Rhodes v. The State.

bent upon the State to go further and describe the nature of the wound, or the character of the disease which resulted.

The objection that the indictment is bad because it shows both miscarriage and death has not even the poor merit of plausibility.

The indictment is not bad for duplicity. An accessory before the fact may be charged as a principal.

The other questions in the case arise on the ruling denying the motion for a new trial.

Complaint is made of the ruling of the court in admitting the declarations and exclamations of the woman upon whom the abortion was committed, but the complaint is groundless. The declarations and exclamations were indicative of pain and suffering, were made by the woman in her last illness, and they did not refer to the past. They were clearly competent. *Board, etc., v. Leggett*, 115 Ind. 544, and authorities cited.

Dr. Smith was called as a witness by the State, and, so far as we can discover, gave no testimony different from that which the State required and expected from him. There is nothing in the record indicating that the State was surprised by his testimony, or that it was regarded as prejudicial. It is true that the witness said, in a general way, that the woman was suffering from a malarial fever, but he was not, when originally called, asked by the State as to whether there were symptoms indicating an attempt to produce an abortion. The testimony of the witness was strongly favorable to the State in one particular, inasmuch as it tended to show the appellant's intimacy with the woman upon whom the instrument was used. After the witness left the stand, and near the close of the case, he was recalled, and the counsel for the State addressed to him this question: "Did not Mrs. Chapman ask you 'what in the world is the matter with her,' and did you not reply 'I don't know; whatever she has done, or has been done, or whatever she has taken, is the cause of the sickness and will be the cause of her death.'" Subsequently

Rhodes v. The State.

Mrs. Chapman was called, and she testified that Dr. Smith was asked by her the question embodied in the interrogatory propounded by the State, and that he answered it as stated in the interrogatory. It is no doubt true that the State may, in the proper case, contradict its witnesses by evidence of contradictory statements made out of court. *Conway v. State*, 118 Ind. 482. Justly limited and rightfully applied, the statutory rule is a wise and salutary one; but if not properly limited and employed it may be very unjust and mischievous. If a party may call a witness, elicit from him only what is expected, and what is not prejudicial, and then prove statements made out of court by the witness, great harm may be done the adverse party. It happens, as the decisions and the books show, that witnesses make careless or reckless statements out of court, which they will not make under oath, and such statements ought not to be brought out by the party who produces the witness unless the testimony of the witness is prejudicial to him. It is, indeed, doubtful whether they can be brought out where there was no obligation on the party to call the witness, and the testimony was what the party knew, or had reason to believe, the witness would give. It is true that evidence of such statements is theoretically evidence affecting credibility only, and is not evidence of the facts embraced in the contradictory statements; but, nevertheless, evidence of contradictory statements does often influence the jury. The limitation placed upon the statutory rule by the decisions is a wise one. That limitation is this: Where the witness gives no prejudicial testimony upon the point to which the contradictory statements relate, evidence of statements made out of court is not competent. Where the party calling the witness is surprised by his testimony, or where it is prejudicial, then contradictory statements as to the point upon which the evidence is prejudicial is competent, otherwise not. *Hull v. State, ex rel.*, 93 Ind. 128; *Conway v. State, supra*, and cases cited; *Miller v. Cook*, 124 Ind. 101. In the case last cited

Rhodes v. The State.

it was rightly held that the contradictory statements must relate to the point upon which the evidence is prejudicial, and so we hold here. While we incline to the opinion that the contradictory statements were improperly admitted in evidence, still we should be unwilling to reverse the judgment for the error, if it was one, for the reason that we think that the erroneous ruling, conceding it to be such, could not possibly have affected the result.

We are unable to perceive upon what ground the ruling of the court permitting the State to show that the woman upon whom the abortion was produced was buried at the expense of the county can be sustained. The evidence was not competent, but for the error in admitting it, if there were no other errors in the record, we should not be inclined to reverse the judgment.

The evidence that some one did use means to produce an abortion upon the woman named in the indictment is sufficiently clear and satisfactory to warrant the inference of guilt. There are circumstances tending to prove that the accused either used the instrument himself or caused some other person to use it. The criminating circumstances are, we repeat, such as warrant the inference of guilt, but they do not absolutely require it.

The evidence upon the material point as to who actually used, or caused to be used, the instrument by which the miscarriage was produced was wholly and purely circumstantial. The case is not, therefore, one in which we can say that a mistake in defining a reasonable doubt or an error in charging the law upon the subject of a reasonable doubt will not compel a reversal of the judgment. If the case were one of direct and satisfactory evidence, or one where the circumstantial evidence was so convincing and clear that we could say without hesitation that the verdict was right, possibly we might affirm the judgment of conviction under the rule laid down in *Heyl v. State*, 109 Ind. 589, even though the

Rhodes v. The State.

instructions are not entirely satisfactory. We are, however, required to decide whether the instructions given upon the subject of reasonable doubt are correct as applied to a case where the evidence of guilt is purely circumstantial.

The settled rule is that instructions upon a single subject must be considered together, and not in fragmentary parts, and, if thus considered, they correctly declare the law they will not be overthrown, even though detached or isolated parts may not be accurate or clear. If, therefore, the series of instructions upon the subject of reasonable doubt, considered as a whole, are not erroneous, the attack of appellant's counsel must fail. In obedience to the settled rule that all of the instructions must be considered, we group those instructions and consider them as an entirety. They read thus :

"3. The defendant is presumed to be innocent, and before he can be convicted the State must prove him guilty beyond a reasonable doubt.

"4. A reasonable doubt arises when the evidence is not sufficient to satisfy the minds of a jury to a moral or reasonable certainty of the defendant's guilt. A reasonable doubt is not an unreasonable doubt—it is a doubt for which a reason can be given. It is not a mere surmise or guess that the defendant may not be guilty of what he is charged.

"5. The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty."

No one of these instructions fully informs the jury of the weight of evidence required to produce the moral certainty which is essential to a conviction of a felony. No one of them gives the test by which to measure the evidence ; at all events, no such test is given as is required by the decisions in the cases of *Bradley v. State*, 31 Ind. 492 (505) ; *Jarrell v. State*, 58 Ind. 293 (297) ; *Knight v. State*, 70 Ind. 375 ; *Gar-*

Rhodes v. The State.

field v. State, 74 Ind. 60; *Behymer v. State*, 95 Ind. 140; *Brown v. State*, 105 Ind. 385; *Farley v. State*, 127 Ind. 419. But we could possibly sustain the instructions, notwithstanding this defect or omission, inasmuch as no specific instructions were asked by the appellant, if there were no affirmative errors in them.

The drift of the entire series upon the essential point, what constitutes a reasonable doubt, is unfavorable to the accused. The jury are repeatedly told what does not constitute a reasonable doubt, but they are not informed what does constitute such a doubt. If, therefore, there are statements directly against the accused they must be regarded as prejudicial, and, if erroneous, we must reverse the judgment. The fifth instruction declares that "If all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." This is not the law. It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured beyond a reasonable doubt that it is a correct conclusion. Life and liberty can not be taken where evidence does no more than necessarily lead to a given conclusion. Jurors must act freely and without compulsion in deciding against life or liberty, for so say the decisions upon the subject. The evidence must lead to the conclusion so clearly and strongly in a case like this, where the evidence is purely circumstantial, as to exclude every reasonable hypothesis consistent with innocence. It is, however, not necessary that the evidence should produce absolute certainty in the minds of the jurors, or that it should dissipate mere conjectures and speculative doubts. *Kennedy v. State*, 107 Ind. 144. The law as declared by an eminent author, and approved in *Sumner v. State*, 5 Blackf. 579, is this: "On the one hand, absolute, metaphysical, and demonstrative certainty, is not essential to proof by circumstances. It is suffi-

Rhodes v. The State.

cient if they produce moral certainty to the exclusion of every reasonable doubt." Professor Greenleaf says: "Neither a preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt." 3 Greenl. Ev. (14th ed.), section 29. It is often true that a preponderance of the evidence will necessarily lead the mind to a conclusion, but where human life or liberty is at stake, reasonable doubt must be removed, and the removal of reasonable doubt is not always essential to a necessary conclusion. A necessary conclusion may logically appear to result, and yet all reasonable doubt be not removed. We do not hold the instruction erroneous because of its statement as to the effect of the bare possibility of innocence, but because it directs the jury that "if the facts established necessarily lead the mind to the conclusion" that the accused is guilty they must convict him.

It is very doubtful whether the statement that the doubt "must be one for which a reason can be given," is correct, but as to that we give no opinion. *Carr v. State*, 23 Neb. 749; *Cowan v. State*, 22 Neb. 519.

One of the jurors made affidavit that his eyesight was so defective that he was unable "to distinguish, one from another, of the faces of the witnesses, that he did not see the face of the defendant, and that he did not see the expressions of the witnesses testifying nor observe their deportment or demeanor." We think that the juror was not competent to sit even in cases where the testimony consists entirely of the statements of the witnesses. Again and again have verdicts been allowed to stand because of the effect declared to be exerted by the demeanor and deportment of witnesses, and surely no one who can not see the expression of faces, nor observe deportment and demeanor, can justly weigh testimony. But in this instance various articles were placed before the jury and used as illustrative of the testimony, none of which was seen by the juror. Clearly his un-

The Ohio and Mississippi Railway Company v. Percy, Administratrix.

fortunate infirmity incapacitated him from properly observing the evidence.

The accused was not negligent, for he, by his counsel, fully examined the jurors as to their qualifications. The answers of the juror of whom we are speaking were such as to disarm suspicion of his disqualification, and there was nothing to indicate that his eyesight was defective.

The State insists that a circumstance which occurred during the trial ought to have warned the defendant's counsel of the juror's infirmity. But we think otherwise. The circumstance was not such as to make it the duty of counsel to note it, and ask for another jury. Counsel, by sworn statements, declare that they did not observe it, and we see nothing in the occurrence to justify the inference that they did observe the juror's infirmity. Nor are they contradicted, for the utmost that can be said of the counter-affidavits is that the affiants believed that counsel did note what occurred.

The judgment is reversed, with instructions to sustain the appellant's motion for a new trial.

Filed May 12, 1891.

No. 14,539.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY v.
PERCY, ADMINISTRATRIX.

MASTER AND SERVANT.—*Railroad.—Damages.—Defective Machinery.—Employee's Means of Knowledge.—What Complaint Must Aver.*—In an action for damages against a railroad company for the death of a brakeman alleged to have been caused by the unsafe and defective condition of a brake on one of the defendant company's cars, it is not necessary to aver facts in the complaint, showing affirmatively that the employee had no means of ascertaining the defect. It is the duty of the master to provide suitable and proper appliances; the employee has the right

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182	201
182	342
132	446
133	269
128	197
134	164
128	197
137	12
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128	197
159	668
128	197
160	324
160	328
128	197
161	7
128	197
167	133
128	197
169	21
128	197
171	315

The Ohio and Mississippi Railway Company v. Percy, Administratrix.

to rely on the master having discharged his duty, and he is not required to search for defects, nor is he required to aver facts in his complaint, showing that he had no means of knowledge. It is sufficient to aver that he had no knowledge of such defect.

SAME.—*Defendant's Knowledge of Defective Machinery.*—*Averment of Complaint as to Sufficiency of.*—*Demurrer.*—*Negligence.*—Where the complaint alleges that the brake was defective in certain particulars, and that the defendant company negligently used such brake in its business upon the day of the injury, and for many days prior thereto, a demurrer will not lie on the ground that the complaint does not allege that the defendant company had any knowledge of the defect, by means of which it is averred the deceased received the fatal injury.

SAME.—*Safe Appliances.*—*Duty of Employer to Furnish and Maintain.*—*Knowledge of Defects Chargeable to Employee.*—The duty of the employer does not end with simply providing safe machinery and appliances for the use of his employees, but the further duty is imposed of continuously exercising reasonable diligence and care to ascertain and know the condition of such machinery and appliances, and to keep them in a safe and proper condition. The employee is charged with the knowledge of such defects as he could have ascertained by the exercise of reasonable care and diligence in this behalf.

INSTRUCTIONS TO JURY.—*Weight of Evidence.*—An instruction is properly refused which tells the jury what weight they should give to the evidence. The jury are the judges of the weight of the evidence.

SAME.—*Co-Employees.*—*Who are not.*—It is not error to refuse to instruct the jury in an action for damages for the death of an employee of a railroad company alleged to have resulted from a defective brake, that the car-inspectors were the co employees of the brakemen. The company was charged with the duty of providing and maintaining safe appliances for use in the operation of its business. If this duty is intrusted to an agent, a car-inspector for instance, such agent stands in the attitude of the master, and is not a co-employee of the brakeman.

SAME.—*Defective Machinery.*—*Knowledge of.*—*Employee.*—It is proper to refuse to instruct the jury, in such an action, that it was the duty of the brakeman to know whether the brake was in good and safe condition, and if he continued to use or operate it without such knowledge and it proved to be unsafe, and because of its infirmity he was thrown from the car and lost his life, then his negligence contributed to the injury and no recovery could be had.

SAME.—*Assuming Facts to be Established.*—*Effect of.*—An instruction is properly refused which assumes that the evidence establishes a fact, and then states what was the duty of a party in view of the fact so assumed to exist.

VERDICT.—*Weight of Evidence.*—A verdict will not be disturbed for the

The Ohio and Mississippi Railway Company v. Percy, Administratrix.

reason that it is not supported by the evidence, if there is any evidence in the record supporting the verdict.

From the Jennings Circuit Court.

E. Barton, W. M. Ramsey, L. Maxwell, R. Ramsey, W. R. Johnston, H. D. McMullen and H. R. McMullen, for appellant.

A. G. Smith, W. Fitzgerald and A. C. Harris, for appellee.

OLDS, C. J.—This action was brought by the appellee, administratrix of the estate of David L. Percy, deceased, against the appellant, to recover damages occasioned by the death of said deceased, who, at the time of the accident which it is alleged caused his death, was a brakeman upon one of the appellant's freight trains.

There was a trial before a jury and a general verdict returned in favor of the appellee, and with their general verdict the jury also returned answers to interrogatories submitted to them.

The appellant filed a motion for judgment in its favor on the answers to interrogatories, notwithstanding the general verdict, which motion was overruled. Appellant also moved for a new trial, which motion was overruled, and a motion in arrest of judgment was made by the appellant and overruled. Exceptions to the several rulings were reserved and judgment was rendered by the court upon the verdict.

Appellant assigns as error that the complaint does not state facts sufficient to constitute a cause of action; that the court erred in overruling appellant's demurrers to the first, second and third paragraphs of the complaint, and each of them; that the court erred in overruling appellant's motion for a new trial; that the court erred in overruling appellant's motion for judgment in its favor upon the answers to interrogatories, notwithstanding the general verdict, and that the court erred in overruling appellant's motion in arrest of judgment.

The Ohio and Mississippi Railway Company v. Percy, Administratrix.

The principal question discussed relates to the sufficiency of the several paragraphs of the complaint.

The first paragraph is as follows :

“ First Paragraph. Florence M. Percy, administratrix of the estate of David L. Percy, deceased, complains of the Ohio and Mississippi Railway Company, defendant, and says that the defendant is a corporation, organized under the laws of the State of Indiana, and owns and operates, for hire, a railroad running through the counties of Jennings, Ripley and Dearborn, in said State, commonly known as the Ohio and Mississippi Railroad ; that, on the 1st day of August, 1887, said David L. Percy was employed by the defendant to work for it in and about its freight trains, in the capacity of a brakeman on said railroad, in the transportation of freight over defendant's said railroad for hire ; that on said day, while said David L. Percy was at work pursuant to his said employment, and in the proper discharge thereof, in the capacity of a brakeman on a certain freight train, then being transported by the defendant over its said railroad, at or near a place known as Moore's Hill grade, in Dearborn county, State of Indiana, he was killed by reason of the defectiveness and unsafe condition of a brake and the appliances thereof on one of the defendant's cars in said freight train, the said brake and appliances being unsafe, defective and out of repair, in this, that the threads of the screw on top of the brake-staff of said brake had become and were worn out and battered so that said threads would not hold a nut securely so as to keep the brake wheel on said brake-staff, when the said wheel was grasped to let off brakes, as said Percy was required in his said employment to do by the defendant as a brakeman on said freight train, and which he might with safety do when said screw and nut were in good condition and repair, which unsafe and defective condition of said brake, brake staff and screw was unknown to said David L. Percy, and which brake, brake-staff and screw the defendant negligently and carelessly used in its said business on said day

The Ohio and Mississippi Railway Company v. Percy, Administratrix.

and for many days prior thereto; that, on said 1st day of August, 1887, at or near the foot of said Moore's Hill grade, the said David L. Percy was required by said defendant, pursuant to said employment, to let off the said brake while said train was in rapid motion, and when he was grasping said brake wheel to let off said brake, the said wheel came off in his hands by reason of the fact that the threads of said screw were in the condition aforesaid, and did not, and would not, by reason of its unsafe and defective condition, retain the nut that held said brake wheel in position on said brake staff, and said brake wheel coming off suddenly in his hands, while the said David L. Percy was applying only sufficient force thereto to let off said brake, he thereby lost his balance and was thrown forward and off said car onto the ground below and killed, without fault or negligence on his part, or on the part of the plaintiff; that said David L. Percy was a young man about 24 years of age, and in good health and splendid physical condition, and had dependent on him for support a young wife and unborn child at the time he lost his life as aforesaid; that, on the — day of November, 1887, the plaintiff was appointed administratrix of his estate by the circuit court of Jackson county, in the State of Indiana. Wherefore plaintiff demands judgment for ten thousand dollars, and all other and proper relief."

It is contended that the first paragraph of the complaint is bad for the reasons that it is not alleged that the appellant company had any knowledge of the defect by which it is alleged the deceased received the alleged fatal injury; that it is not averred in the complaint that the deceased did not have the same means of knowledge as to the defects complained of as the appellant had; that it is shown by the averments of the first paragraph of the complaint that the deceased at the time of the injury was an employee of the appellant company, employed by the appellant to work for it in and about its freight trains in the capacity of a brakeman on said railroad in the transportation of freight

The Ohio and Mississippi Railway Company v. Percy, Administratrix.

over appellant's said railroad for hire, and while so employed the injury occurred; that it is nowhere alleged that appellant had not exercised ordinary care and prudence in procuring the brake and staff in question, nor that when the brake-staff was put upon the car it was unsafe or defective.

The law imposes upon an employer the duty of providing for his employee a reasonably safe place to work, and safe machinery to work with. As applicable to the case at bar, the law imposed a duty on the railroad company to provide and maintain reasonably safe and suitable cars, together with the necessary appliances to run and operate the trains. These duties were imposed upon the master, and the employee had the right to rely upon their having been performed. True, the employee was charged with the duty of exercising his faculties, and with the knowledge of such defects as were observable with the reasonable exercise of his faculties in connection with the performance of his accustomed duties, but he was not bound to search for defects, or to test the machinery in advance of using it, for he had the right to proceed to use the appliances for the operation, running and management of the train, relying upon the master having discharged his duty and provided safe appliances without stopping to investigate the sufficiency or soundness of the appliances, unless the defect was so apparent as to convey to him its unsafe and dangerous condition upon his approach without investigation. If the employee had actual knowledge of its unsafe condition, then it would be negligence to use it, and if knowing the unsafe condition of the appliance the employee attempted to use it he would assume the extra hazard in so doing.

The duty on behalf of the employer does not end with simply providing safe machinery and appliances for the use of his employees, but the further duty is imposed of continuously exercising reasonable diligence and care to ascertain and know the condition of such machinery and appli-

The Ohio and Mississippi Railway Company v. Percy, Administratrix.

ances, and to keep them in a proper and safe condition, and the employee is charged with the knowledge of such defects as he would have ascertained by the exercise of reasonable care and diligence in this behalf.

In the case of *Cincinnati, etc., R. R. Co. v. McMullen*, 117 Ind. 439, this court says: "It is, however, the duty of a railroad company to provide and maintain reasonably safe and suitable cars and other appliances for its employees to work with, and it can not escape liability to an employee, who, without fault or neglect on his part, suffers injury from the use of defective appliances or implements, by showing that the failure to discover and amend the defect was attributable to the neglect of an agent of the company to whom the duty of selecting and inspecting its cars and their appendages had been committed. An employee is required to observe and avoid all known or obvious perils, even though they may arise from defective machinery and appliances; but he is not bound to search for defects, or make a critical inspection of the appliances which are provided for his use. These are duties of the employer, who is required not only to furnish reasonably safe and suitable tools and machinery, but to exercise such a continuing supervision over them, by such reasonably careful and skilful inspection and repair, as will keep the implements which employees are required to use in such a condition as not unnecessarily to expose them to unknown and extraordinary hazards."

In relation to the duty of the employer in this respect, in the case of *Northern Pacific, etc., R. R. Co. v. Herbert*, 116 U. S. 642, it is said: "If no one was appointed by the company to look after the condition of the cars, and see that the machinery and appliances used to move, and stop them, were kept in repair and in good working order, its liability for the injuries would not be the subject of contention. Its negligence in that case would have been in the highest degree culpable. If, however, one was appointed by it charged with that duty, and the injuries resulted from its negligence

The Ohio and Mississippi Railway Company v. Percy, Administratrix.

in its performance, the company is liable. He was, so far as that duty is concerned, the representative of the company; his negligence was its negligence."

This statement of the law is quoted with approval in the case of *Cincinnati, etc., R. R. Co. v. McMullen*, *supra*. The company being charged with the duty of providing and maintaining safe appliances for use in the operation of a train of cars, if this duty is intrusted to an agent, such agent stands in the attitude of the master, and is not a co-employee with the brakeman.

The first paragraph of this complaint alleges and describes the unsafe condition of the brake, following with the averment, "Which unsafe and defective condition of said brake, brake-staff and screw was unknown to said David L. Percy, and which brake, brake-staff and screw the defendant negligently and carelessly used in its said business on said day, and for many days prior thereto."

It is further averred that the injury occurred without fault or negligence on the part of Percy, or the plaintiff. There are no averments to show that the employer, Percy, had ever used or seen the car-brake, which was defective prior to the injury, and that the injury occurred while in the discharge of his duty attempting to set, or let off said brake while the train was in rapid motion. There are no facts stated in the paragraph showing that the employee had any actual notice of the defect in the brake, or which would impute to him knowledge of such defect, but it is expressly averred that such defect was unknown to him, and the complaint is clearly sufficient in so far as it is necessary to aver the want of negligence on the part of the employer. It is not necessary, in a suit for damages by an employee against the employer, to aver in the complaint facts showing affirmatively that the employee had no means of ascertaining the defect. It being the duty of the master to provide suitable and proper appliances, the employee had the right to rely on the master having discharged his duty in this respect, and he

The Ohio and Mississippi Railway Company v. Percy, Administratrix.

is not bound to search for defects, nor is he required to aver facts in his complaint showing that he had no means of knowledge ; but it is sufficient to aver that he had no knowledge of such defect. Particularly this is true where, as in the complaint in this case, no facts appear from which knowledge of such defects can be imputed to him.

It is further objected that there is no affirmative averment in this paragraph that the appellant company actually knew of the defective and dangerous condition of the brake. In the case of *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151, the alleged injury occurred on account of an iron splinter allowed to remain protruding from the iron rail. The averments of the complaint were that "the bottom of plaintiff's pantaloons upon his right leg was pierced by a sharp piece of iron negligently left by defendant projecting from the rail of defendant's said road, which defendant at said place had negligently and carelessly suffered to get and remain out of repair." Of this averment the court says: "The contention on the part of appellant's counsel, amongst other things, is, that it is not alleged that appellant knew, or with reasonable care might have known, of the unsafe condition of the rail, and that it is not alleged that appellee did not know, or with reasonable care might not have known, that the rail was in an unsafe condition. Upon the hypothesis that the *gravamen* of the action is alone the negligence of appellant in connection with the rail, and that to constitute negligence in that regard it is essential that appellant knew, or with reasonable care might have known, of its unsafe condition, still, the general averment that appellant negligently left the sliver or splint, projecting from the rail, is sufficient under many decisions of this court. * * * And so, too, in relation to the general averment that appellee was without fault or negligence."

In the case of *Cleveland, etc., R. R. Co. v. Wynant*, 100 Ind. 160, it is said: "It is settled by the decisions of this

The Ohio and Mississippi Railway Company v. Percy, Administratrix.

court, that a general allegation of negligence is sufficient to withstand a demurrer to the complaint for the want of facts ; and that, under such allegation, the facts constituting negligence may be given in evidence."

The complaint, in the case at bar, charges that: "Which brake, brake-staff and screw the defendant negligently and carelessly used in its said business on said day and for many days prior thereto." The previous averments in the complaint describe the brake, brake-staff and screw, which came apart and caused the injury, alleging that they were "unsafe, defective and out of repair, in this, that the threads of the screw on top of the brake-staff of said brake had become and were worn and battered so that said threads would not hold a nut securely so as to keep the brake-wheel on said brake-staff when the said wheel was grasped to let off brakes."

The fair construction to be put upon the averment of the complaint in relation to the negligence of the appellant is, that the appellant used the brake in that worn, battered and unsafe condition, in its business, on the day of the injury and for many days prior thereto. The car is described as one of the appellant's own cars and the averments show the defective condition to have been the result of wear and battering. It was the duty of the appellant to inspect its cars, and the averment in this paragraph that it negligently and carelessly used this brake, brake-staff and screw in its business, on said day and for many days prior thereto, is sufficient to withstand a demurrer.

The demurrer admits the truth of the allegations in the paragraph. It admits that the brake was defective as alleged. It admits that the appellant negligently used such defective brake in its business upon the day of the injury and for many days prior thereto, and that the deceased had no knowledge of such defect, and the injury occurred without his fault or negligence.

There was no error in overruling the demurrer, and the

The Ohio and Mississippi Railway Company v. Percy, Administratrix.

complaint being good, as against a demurrer, it was good after judgment to withstand a motion in arrest.

The averments of the second and third paragraphs of the complaint are equally as strong as the averments of the first.

They each charge knowledge of the defective condition of the brake on the part of the appellant.

We do not deem it necessary to set out these paragraphs, for, under the rules we have stated as applicable to the first paragraph, each is sufficient. *Louisville, etc., R. W. Co. v. Buck*, 116 Ind. 566.

It is contended that a new trial should have been granted for the reason that the evidence does not sustain the verdict. If there is some evidence supporting each of the material averments of the complaint, then the evidence supports the verdict, and this court will not reverse a judgment on account of the insufficiency of the evidence. This has been the long settled law of this State as enunciated by the decisions of this court and by them we must be governed.

In the light of this rule we have considered the evidence. We do not think any good purpose would be subserved by extending the decision to discuss and analyze it; we think it sustains the verdict of the jury.

It is also contended that the court erred in giving and refusing instructions.

We have read and considered the instructions given and those asked by the appellant and refused by the court. They present no questions of law but what have heretofore been settled by this court, and no good can be accomplished by setting them out.

The instructions given are carefully drafted, and state the law of the case correctly. They fully cover all phases of the law applicable to the facts.

The first instruction asked by the appellant and refused tells the jury what weight they shall give to certain evidence. This was erroneous. The jury are the judges of the weight of the evidence.

The Ohio and Mississippi Railway Company v. Percy, Administratrix.

The second states the law to be that the car inspectors are the co-employees of the brakeman. This is not the law.

The third tells the jury that it was the duty of the deceased to know whether or not the brakes and brake-staffs upon the train upon which he was working were in good and safe condition, and if he undertook to use or operate the brake upon the car from which he fell without informing himself as to whether it was in a good and safe condition for use, and it proved to be unsafe, and because of its infirmity he was thrown from the car and lost his life, then his negligence contributed to the injury, and the plaintiff can not recover. This instruction is contrary to all modern authority, and was properly refused.

The fourth states substantially the same principle of law as the third—that it was the duty of the deceased to examine the brakes upon all the cars before attempting to use them.

The fifth states substantially the same principle of law, as the second, in regard to the car inspectors and brakemen being co-employees. And the sixth assumes that the evidence establishes a fact, and then states what was the duty of the deceased in view of the fact so assumed to exist, and there was no error in refusing it.

The court committed no error in giving or refusing instructions.

It is further contended that the court erred in overruling the appellant's motion for judgment in its favor notwithstanding the general verdict.

The answers to interrogatories are not inconsistent with the general verdict. They find the brake to be defective, that the screw had rusted so as not to hold the wheel upon the top of the staff, and that the car inspectors neglected their duty, and did not inspect it, that the injury occurred on account of this defect.

There is no error in the record.

Judgment affirmed, with costs.

Filed April 30, 1891.

Sedwick *et al.* v. Ritter *et al.*

No. 14,939.

SEDWICK ET AL. v. RITTER ET AL.

REAL ESTATE.—*Action to Recover.*—*Within what Time Must be Brought.*—*Foreclosure Sale.*—*Statute of Limitations.*—*Legal Disabilities.*—*Married Woman.*—*Execution Debtor.*—*Who is Under Section 293, R. S. 1881.*—A mortgage was executed by a husband and wife on the lands of the husband to secure his debt. After the execution of the mortgage the land was conveyed to the wife. The mortgage was thereafter foreclosed, the husband and wife being made parties to the foreclosure proceedings. The land was sold at sheriff's sale, the mortgagor being the purchaser, and in due time he received a sheriff's deed therefor. After the death of the wife, and more than ten years from the date of the foreclosure sale, an action was instituted by the husband and children to recover said real estate, on the ground that the decree for the sale of the land was void for certain reasons set forth in the complaint.

Held, that the husband was an execution debtor within the contemplation of section 293, R. S. 1881, and that any action for the recovery of the real estate in which he joined must be brought within ten years after the foreclosure sale.

Held, also, that the wife was an execution debtor under the provisions of the statute, and that all persons claiming title under her, acquired since the rendition of the judgment, must bring suit within ten years after the foreclosure sale.

Held, also, that the sale of the land under the decree was sufficient to give color of title and bring the case within the operation of the statute of limitations.

Held, also, that the wife was not within the exception in favor of persons under legal disabilities, contained in the present statute.

PLEADING.—*Complaint.*—*Joint Cause of Action.*—*Demurrer.*—A complaint not showing a cause of action in favor of all the plaintiffs is bad on demurrer.

From the Mouroe Circuit Court.

E. K. Millen, H. C. Duncan and I. C. Batman, for appellants.

D. E. Beem and W. Hickman, for appellees.

MILLER, J.—The appellants instituted this action against the appellees to recover real estate, and quiet their title to the same.

VOL. 128.—14

128	209
124	247
135	253
136	653
128	209
139	205
128	209
150	314
128	209
156	622
156	623

Sedwick et al. v. Ritter et al.

The sufficiency of the second paragraph of the complaint, to which a demurrer was sustained, presents the only question in the case.

It appears from the complaint that on the 1st day of March, 1867, the plaintiff, James E. Whitesell, was the owner of the southwest quarter of section ten, in township nine north, of range two west; also a part of the northwest quarter of the same section, described by metes and bounds, containing in all two hundred acres; that on the 10th day of July, 1868, said land was conveyed by the owner and Matilda, his wife, to John E. Sedwick, and by him immediately reconveyed to said Matilda; that on the 10th day of March, 1867, James E. Whitesell and another were indebted to Henry Ritter in the sum of \$5,000, and on that day Whitesell and wife executed to Ritter a mortgage on a tract of real estate, the description of which is identical with the description above set out, except that in describing the quarter sections the word "east" is used instead of the word "west." This mortgage was foreclosed September 1st, 1874, and a judgment rendered against the makers of the note for \$8,000, and a decree for the sale of the land entered. Afterwards, on the 8th day of October, 1874, Ritter began another proceeding to foreclose the mortgage, making Whitesell and wife parties defendant, as well as certain officers of the county.

It is averred that the complaint in that case did not allege any mistake in the mortgage or in the description of the real estate, nor did it refer to the prior foreclosure of the mortgage, or aver that the real estate had been sold for taxes, or that the land had been sold and conveyed to Matilda Whitesell, or ask for a reformation of the mortgage.

The defendants did not appear to the action, and were defaulted. On the 8th day of April, 1875, a judgment was rendered against the makers of the note for \$10,704, of which \$718.02 was on account of delinquent taxes for which the land had been sold and purchased by the plaintiff. A

Sedwick et al. v. Ritter et al.

decree for the foreclosure of the mortgage was also entered, in which the real estate above described, owned by Matilda Whitesell, was correctly described. A certified copy of the decree was issued to the sheriff, and on the 22d day of May, 1875, the land was sold to the plaintiff, Ritter, for the sum of \$11,000. In due time a sheriff's deed was executed to the purchaser, and possession taken under his purchase. Matilda Whitesell died on the 1st day of July, 1887, leaving her husband and the other appellants, who are her children, as her only heirs at law. Henry Ritter also died on the 1st day of September, 1887. The appellees are his children and heirs.

The appellants claim that the decree for the sale of the land was without the issues of the case, and void; that Matilda Whitesell having been brought into court for the foreclosure of a mortgage on one tract of land, the entry of a decree against her for the sale of a different tract was not simply erroneous, but void.

The view that we take of another question involved renders it unnecessary for us to examine or pass upon this one.

The appellant, James E. Whitesell, who was joined with the other appellants as a plaintiff, was, beyond all question, one execution debtor. It was his debt; he was a judgment debtor, and after the execution issued on the judgment, an execution debtor, within the strictest definition of the term. The fact that the land had been conveyed to his wife did not make him any the less a debtor. The provision contained in the third clause of section 293, R. S. 1881, that actions for the recovery of real property, by the execution debtor, must be brought within ten years after the sale, constitutes a complete bar to his right of recovery.

It necessarily follows that the complaint, not showing a cause of action in favor of all the plaintiffs, is bad on demurrer. *Neal v. State, ex rel.*, 49 Ind. 51, and cases cited.

We are also of the opinion that the cause of action is

Sedwick et al. v. Ritter et al.

barred against all who claim title under Matilda Whitesell, acquired since the rendition of the judgment.

The clause of the statute under consideration prescribing within what time an action shall be commenced is as follows :

“Third. For the recovery of real property sold on execution, brought by the execution debtor, his heirs, or any person claiming under him, by title acquired after the date of the judgment, within ten years after the sale.” Section 293, R. S. 1881.

This limits the time within which such suits should be brought by the following persons :

1. By all who were parties to the suit in which the judgment was obtained, and against whom the execution issued for its enforcement.

2. By persons who acquired title under those of the preceding class after the execution of the judgment upon which the execution was issued, and the land sold.

The decree upon which the land was sold was an execution within the meaning of this statute. Every writ which authorizes an officer to carry into effect a judgment, or order, of a court of law, or a final decree of a court of equity, is an execution. *Freeman Executions*, section 2 ; *Pierson v. Hammond*, 22 Texas, 585 ; *United States v. Nourse*, 9 Pet. 8 ; *Darby v. Carson*, 9 Ohio, 149.

Matilda Whitesell was a party to the suit, and we may infer that the decree directed the sale of her interest in the property therein described. She was therefore a party to the execution, which was a certified copy of the decree rendered against her and her co-defendants for the sale of the property, and embraced within the term “ execution debtor,” used in the statute.

The case of *Brenner v. Quick*, 88 Ind. 546, is not in conflict with this position, for in that case the wife was not a party to the foreclosure, and, therefore, not an execution defendant.

The decree rendered against Matilda Whitesell was, doubt-

The Chicago and Indiana Coal Railway Company v. Hunter *et al.*

less, erroneous, and may have been void ; but the sale of the land under the decree was sufficient to give color of title, and bring the case within the operation of the statute of limitation. *Brenner v. Quick, supra* ; *Orr v. Owens, post*, p. 229.

The fact that Mrs. Whitesell was a married woman does not bring her within the exception in favor of persons under legal disabilities, contained in the present statute. *Rosa v. Prather*, 103 Ind. 191 ; *City of Indianapolis v. Patterson*, 112 Ind. 344.

Judgment affirmed.

Filed May 12, 1891.

No. 14,857.

THE CHICAGO AND INDIANA COAL RAILWAY COMPANY
v. HUNTER ET AL.

PRACTICE.—Pleading.—Leave to Amend.—Discretion of Court as to.—Rule on Appeal.—The granting of leave to amend pleadings, after the issues are closed, and especially pending the trial, is a matter resting largely in the discretion of the trial court. It is only in cases where there seems to have been an abuse of that discretion, apparently resulting in injustice, that the Supreme Court will interfere. Where the record shows that the party requesting leave to amend could not possibly have been injured by the refusal of the court to permit it, the question whether or not the court abused its discretion will not be inquired into.

SAME.—Errors.—When Party can Complain.—A party can only complain of the court's errors when he is injured by them.

SAME.—Errors Assigned.—When Waived.—A party to be entitled to have alleged errors considered must do more than merely call attention to them, and assert that they are errors. Unless there is at least an attempt at argument, or something to indicate wherein they are claimed to be erroneous, aside from the mere assertion, they will be considered as waived.

EMINENT DOMAIN.—Condemnation Proceedings.—Measure of Damages.—Assessment of Damages.—The rule in condemnation proceedings is that all damages present or prospective, that are the natural or reasonable incident of the improvement to be made, or work to be constructed, not

128	213
132	437
128	213
138	311
128	213
140	53
128	213
149	179
150	680
128	213
154	340
128	213
167	57
108	210
168	218
168	242
168	243

The Chicago and Indiana Coal Railway Company v. Hunter *et al.*

including such as may arise from negligence or unskillfulness, or from the wrongful act of those engaged in the work, must be assessed. Damages are assessed once for all, and the measure should be the entire loss sustained by the owner, including in one assessment all injuries resulting from the appropriation.

SAME.—*Damages.—What May be Considered in Estimating.—Railroad.*—In an action for the appropriation of lands by a railroad company, it was proper to instruct the jury that they might consider the manner in which the land would be divided by the line of the railroad as affecting the size and shape of the fields, the access of stock to water, the passage from one part of the farm to another, the possible danger from fire emitted from the locomotives, etc.

From the Benton Circuit Court.

S. H. Spooner, W. H. Darroch and U. Z. Wiley, for appellant.

E. P. Hammond, W. B. Austin, M. H. Walker, G. H. Gray and T. C. Annabal, for appellees.

McBRIDE, J.—This was a proceeding by the appellant for the appropriation of certain lands in Newton county belonging to appellee Elijah Hunter for right of way.

Appraisers, duly appointed, having made their report, both parties filed exceptions to the award. The cause was taken on change of venue to Benton county, where it was tried by a jury. On the third day of the trial, but before the appellees had closed their evidence, the appellant filed its written motion, supported by affidavits, for leave to amend its articles of appropriation. This motion the court overruled. Appellant insists that the court erred therein, and it is over this question the principal controversy is waged. Appellees insist that the question is not properly in the record, but in this they are in error. It was properly saved and is fairly presented.

As a rule, the granting of leave to amend pleadings, after the issues are closed, and especially pending the trial, is a matter resting largely in the discretion of the trial court. It is only in cases where there seems to have been an abuse of

The Chicago and Indiana Coal Railway Company v. Hunter *et al.*

that discretion, apparently resulting in injustice, that this court will interfere.

In the case of *Chicago, etc., R. W. Co. v. Jones*, 103 Ind. 386, the court said: "Whether a party shall be allowed to amend his pleadings after the issues are closed, is a matter resting very much in the discretion of the *nisi prius* court. The fact that in such a case leave of court is necessary, implies the right of the court to refuse permission to amend in any case except upon good cause shown, and, even when a showing is made, the matter is still within the legal discretion of the court, the leave to be granted or refused accordingly. But the decision of the *nisi prius* court, when cause is shown, is not conclusive. It may be reviewed in this court, and will be disapproved when substantial injustice appears to have been done."

It will be necessary for us to examine the entire record to determine whether or not, in the language of the court just quoted, "substantial injustice appears to have been done." If, from such an examination, it appears that no injustice resulted to appellant by reason of the refusal to permit the amendment, we will not be justified in reversing the cause upon that ground.

The exceptions filed by the appellee Hunter contained the following:

"b. Said lands of said defendant, other than that appropriated by said plaintiff, are, and will be, damaged in the sum of one thousand dollars on account of being caused to overflow with water by reason of the defective drainage made, and to be made, by said plaintiff on each side of its railroad track on said right of way, and by reason of the insufficient culverts and unnecessary culverts constructed by it across its right of way.

"c. By reason of its said appropriation, and the manner in which said plaintiff has dug trenches on each side of its railroad track on said right of way, said defendant will be

The Chicago and Indiana Coal Railway Company v. Hunter *et al.*

put to an expense of one thousand dollars in drainage on his said lands, not proposed to be appropriated by said plaintiff."

There was evidence showing that on the south line of the land of appellee, Elijah Hunter, there was a ditch running east and west, in which the water flowed to the west. On the north side of this ditch there was an embankment some two feet high, made to prevent the water from overflowing from the ditch and running north on said appellee's land, the flow of the water being naturally northward from the ditch. The appellant, in making its railroad, cut this embankment on the right of way proposed to be appropriated in this action, and there was evidence tending to show that it did not securely repair the breach, and that, as a consequence, the water, in times of freshets, broke through or over the opening and overflowed a large quantity of appellee's land. There was, however, conflict in the evidence as to the condition in which appellant left the embankment, there being testimony upon its part tending to show that at the time of the trial the embankment had been restored to its normal condition.

The amendment which appellant proposed to make is as follows:

"The plaintiff agrees to construct and maintain an embankment on and across its said right of way of the uniform height of two feet, being as high as the face of the railroad at that point from the surface of the ground, at a point on its said right of way at or near the southeast corner of the northwest quarter of section eleven, in township twenty-seven north, of range eight west, in Newton county, Indiana. Said embankment so agreed to be constructed and maintained by the plaintiff, to connect with either side of the road-bed of plaintiff at that point, and also connecting with an embankment heretofore constructed and existing at that point along the north bank of an open ditch passing at this point, and in line with said old embankment. Said embankment to be so constructed as to form with said old

The Chicago and Indiana Coal Railway Company v. Hunter *et al.*

embankment and the road-bed of said plaintiff's railroad, a complete barrier and levee, to resist the overflow of water to the full height of two full feet from the common surface of the ground at that point, and so protect the land of said defendant, Elijah Hunter, from the overflow of water from said open ditch or from any other source.

"Plaintiff further agrees to construct and maintain borrow pits or ditches along either side the line of its road-bed, through and across the lands of defendant, Elijah Hunter, over which the same passes, to wit: The northwest quarter of section eleven, the southeast quarter of section three, and the southwest quarter of section two, in said town and range, and to construct and maintain at the farm and public highway crossings on said land, culverts and waterways, so as to afford a free and unobstructed flow of water down and along said right of way, and discharge the same off and through the culverts and waterways at said public highway crossings, and to fill up and maintain at the west line of the public highways, on the east line of the southeast quarter of said section three, all borrow pits, ditches and excavations there made by them on its right of way at that point, and to form, construct and maintain at that point an embankment of the height of one foot from the common surface of the ground across its right of way so as to form a complete barrier against the flow of water through, over and across the right of way of plaintiff at that point upon and across the lands of said Elijah Hunter."

Those portions of the exceptions quoted were evidently intended to lay the foundation for the recovery of damages for permanent injury to the land by reason of the destruction of the embankment which protected the land from overflow by the surplus waters of the ditch.

The amendment proposed to be made to the articles of appropriation was of course designed to remove that element, and prevent the recovery of damages because of any such permanent injury. Much evidence was introduced by the

The Chicago and Indiana Coal Railway Company v. Hunter *et al.*

appellee addressed to that point. The jury, however, found against the appellee, and did not allow any damages for any such permanent injury.

The jury returned a general verdict and also answers to special interrogatories propounded by both parties.

The twenty-seventh interrogatory propounded by the appellant to the jury, and the answer of the jury thereto, were as follows :

“ 27. In estimating the damage of the defendant Elijah Hunter, if you find that he has sustained any damages by reason of the appropriation by plaintiff of its right of way over and across the northwest quarter of section 11, the southwest quarter of section 2, and the southeast quarter of section 5, in township twenty-seven north, of range eight west, in Newton county, Indiana, and the construction of its railroad thereon, what amount of damages, if any, do you find that said defendant sustained on account of any permanent injury to said lands, and to the northeast quarter of section ten in said township and range, by reason of overflow of water on said lands, caused by the construction of plaintiff's railroad? Answer. None.”

It is manifest that if the jury allowed no damages for any permanent injury to the land by reason of overflow of water the appellant was not harmed because not allowed to file an amendment, the sole purpose of which was to prevent the recovery of damages for such assumed permanent injury. It is therefore unnecessary for us to inquire whether or not on the showing made the court abused its discretion in refusing to permit the amendment.

Counsel for appellant insist with much earnestness that notwithstanding this answer the circumstances all indicate that the jury considered such matters, and that we must presume that they did consider them, and did allow damages on account thereof. The answer of the jury is conclusive, and we can not disregard it.

Appellant moved for a judgment in its favor on the an-

The Chicago and Indiana Coal Railway Company v. Hunter *et al.*

swers to interrogatories notwithstanding the general verdict, and urges that the court erred in overruling the motion.

Counsel say the answers are irreconcilable and inconsistent with the general verdict. They do not point out the particulars wherein they are inconsistent and irreconcilable, and we might well disregard the alleged error. We have, however, examined the interrogatories, and the only inconsistency apparent seems to be that, by the answers to the interrogatories the appellees are shown to be entitled to a greater sum for damages than that allowed by the general verdict. In our opinion this is something of which appellant can not complain.

The questions next discussed arise on the motion for a new trial, and relate to the action of the court in giving and refusing certain instructions.

Of these instructions, the seventh and twelfth, tendered by the appellant and refused, the sixth, tendered by the appellees and given, and the first, given by the court of its own motion, all relate to the claim of appellee to permanent damages to his land, growing out of the alleged destruction or breaking of the embankment and consequent overflowing of his land.

Like the question presented on the action of the court in refusing to allow the amendment of the articles of appropriation, we need not consider whether the court erred or not in either refusing or giving these instructions. The appellees having recovered nothing on that portion of their claim, no injury resulted to the appellant. A party can only complain of the court's errors when he is injured by them.

The tenth and eleventh instructions tendered by the appellant, and refused by the court, are as follows:

"10. If you find, from the evidence, that the plaintiff's road over the land of Elijah Hunter, in controversy in this action, was not completed at the beginning of this suit, and at this time, then, in your estimate of damages, which we

The Chicago and Indiana Coal Railway Company v. Hunter *et al*

will sustain, if any, you will only consider such as will naturally result from the proper construction of said road.

"11. Your estimate of damages to Elijah Hunter, if you find he has sustained any, by the construction of plaintiff's road upon his land, will be confined to the time immediately after the appropriation by the plaintiff of its right of way over the land in controversy, and you will not be permitted to consider any damages which will not result from the proper construction of the plaintiff's road."

It may well be said as an abstract proposition that the damages proper to be awarded in such cases are only such as will result from a *proper* construction of the road. The presumption is, that the road will be constructed in a proper manner. For injuries resulting from a negligent construction, or from any wilful misconduct in its construction, an action will lie, notwithstanding the property has been regularly condemned and compensation awarded. *Pittsburgh, etc., R. W. Co. v. Gilleland*, 56 Pa. St. 445; *Southside R. R. Co. v. Daniel*, 20 Grattan, 344.

The rule in condemnation proceedings is that all damages, present or prospective, that are the natural or reasonable incident of the improvement to be made, or work to be constructed, not including such as may arise from negligence, or unskilfulness, or from the wrongful act of those engaged in the work, must be assessed.

Damages are assessed once for all, and the measure should be the entire loss sustained by the owner, including in one assessment all injuries resulting from the appropriation. *Elliott Roads and Streets*, 199, and cases there cited; *White v. Chicago, etc., R. R. Co.*, 122 Ind. 317.

In instruction numbered eight, tendered by the appellant, and those numbered two and three, tendered by the appellee, the court gave to the jury full and fair instructions relating to the measure of damages.

Among other things the jury was properly instructed that they might consider the manner in which the land was di-

The Chicago and Indiana Coal Railway Company v. Hunter *et al.*

vided by the line of the railroad as affecting the size and shape of the fields, as affecting the access of stock to water, as affecting the passage from one part of the farm to another, as affecting the possible danger from fire emitted from the locomotives, to which might have been added many other things either annoying or hurtful, necessarily incident to the permanent location and operation of a railroad across one's premises.

We think the tendency of the above instructions numbered ten and eleven, if given to the jury, would have been to confuse if not mislead them.

The rule indicated, when addressed to a jury for their guidance, is too narrow, and in our judgment the court did not err in refusing to give the instructions.

Ten errors are assigned, but the appellant only discusses the three which we have considered.

The motion for a new trial, which presents the alleged errors of the court in giving and refusing instructions, assigns in all nineteen reasons for a new trial. Of the reasons not discussed counsel in their brief say: "We will content ourselves in this brief by merely calling the attention of the court to these questions, with the suggestion that in the admission of the evidence pointed out, and to which the appellant at the time objected, the trial court erred, and that the appellant is entitled to the consideration of these errors." To be entitled to have alleged errors considered a party must do more than merely call attention to them and assert that they are errors. Unless there is at least an attempt at argument, or something to indicate wherein they are claimed to be erroneous, aside from the mere assertion, they will be considered as waived.

Judgment affirmed, with costs.

Filed May 1, 1891.

Davis *et al.* v. The Ladoga Creamery Company, by Talbut, Receiver.

No. 15,000.

DAVIS ET AL. v. THE LADOGA CREAMERY COMPANY, BY
TALBUT, RECEIVER.

RECEIVER.—*Action by.*—*Leave of Court to Sue.*—*Complaint Must Show.*—A complaint filed by a receiver which fails to allege that leave of the court to institute and prosecute the action has been obtained is fatally defective.

SAME.—*Alone has the Right to Sue.*—Where a receiver is appointed for a company he succeeds to all the rights of the company, and he alone, under the orders of the court, can maintain an action for the enforcement of such rights. The right of the company to sue is suspended as long as there is an acting receiver.

From the Montgomery Circuit Court.

P. S. Kennedy, S. C. Kennedy, B. T. Ristine and T. H. Ristine, for appellants.

J. F. Harney, for appellee.

COFFEY, J.—This was an action commenced by the appellee against the appellants in the Montgomery Circuit Court for the specific performance of a parol contract to convey real estate.

The material allegations found in the complaint are that the appellee, Talbut, was duly appointed receiver of the Ladoga Creamery Company by the Montgomery Circuit Court, in the year 1887; that said company is the equitable owner, and has been in the possession since May 8th, 1886, of the land described in the complaint; that said company came into the possession of said land claiming ownership thereof by purchase from the appellants, Samuel Davis and Thomas Rankin, who were doing business under the firm name and style of Davis & Rankin; that said purchase was made by parol from the agent of the said appellants on the 8th day of May, 1886, by which said appellants agreed to convey said land in fee simple to said company by warranty deed, in consideration of the sum of three hundred and fifty dollars then paid; that said deed was signed by the appellants

128	222
134	673
128	222
137	236
128	222
142	352
128	222
149	61
128	222
155	674

Davis *et al.* v. The Ladoga Creamery Company, by Talbut, Receiver.

and submitted to the inspection of said company and its agents and officers, and was believed by them to have passed to the rightful possession of the said company, but that it has since been made to appear that the Bank of Ladoga, with which it was left, was not the agent of said company to receive the same, but was the agent of the appellants who ordered said bank to withhold said deed from said company; that the appellants have taken said deed and have refused and still fail and refuse to deliver the same as it agreed to do; that appellees have performed said agreement on their part. Prayer for specific performance.

The objections urged to this complaint are:

First. That the action is brought by a receiver, and the complaint does not allege that the appellee, Talbut, had any authority from the court appointing him, to bring this suit.

Second. That there is no sufficient allegation in the complaint to take the case out of the statute of frauds.

Third. that there is no allegation of a demand for a deed before suit brought.

Mr. High, in his work on Receivers, section 201, says: "It is essential, therefore, in order to sustain a suit brought by him (the receiver) in his representative capacity that he allege and set forth the equities of the parties whose rights of action he represents, and he must also show that by the appointment of the court, properly made in a matter within its jurisdiction, authority has been conferred upon him, in his representative capacity as receiver, to prosecute the action; and failing to show this he can not maintain an action."

Mr. Beach, in his work on Receivers, section 650, says: "Out of the established doctrine that a receiver is the officer of the court—the 'hand' by which it executes its will in regard to the property in its keeping—is deduced the well nigh universal rule that a receiver may not bring any suit without having first obtained leave of the court."

In the case of *Garver v. Kent*, 70 Ind. 428, the receiver

Davis *et al.* v. The Ladoga Creamery Company, by Talbut, Receiver.

obtained judgment on a promissory note, in his own name as receiver. The judgment was reversed by this court because the receiver failed to allege in his complaint that he had obtained leave of the court to prosecute the action. In that case the court said: "In the case before us, there is no averment in the complaint, that the court appointing the plaintiff as receiver authorized him to bring this or any action or actions in his own name, in matters concerning his receivership. The objection is fatal to the plaintiff's recovery, as the complaint states no facts showing a right of action in him."

To the same effect is *Moriarty v. Kent*, 71 Ind. 601, and *Harrell v. Kent*, 71 Ind. 602. See, also, *Herron v. Vance*, 17 Ind. 595; *Coope v. Bowles*, 28 How. Pr. 10; *Keen v. Breckenridge*, 96 Ind. 69; *Wynn v. Lord Newborough*, 3 Bro. C. C. 88; *Green v. Winter*, 1 John. Ch. 60; *Ward v. Swift*, 6 Hare, 312; *In re Merritt*, 5 Paige, 125; *Merritt v. Merritt*, 16 Wend. 405; *Davis v. Snedd*, 33 Gratt. 705; *Swaby v. Dickson*, 5 Sim. 629; *Battle v. Davis*, 66 N. C. 252; *Screven v. Clark*, 48 Ga. 41; *Glenn v. Busey*, 3 Cent. Rep. 283.

Under these authorities a complaint filed by a receiver which fails to allege that leave of the court to institute and prosecute the action has been obtained is fatally defective.

It was held in the cases of *Ohio, etc., R. W. Co. v. Nickless*, 71 Ind. 271, and *Elkhart Car Works Co. v. Ellis*, 113 Ind. 215, that in suing a receiver it was not necessary to allege that leave of the court had been obtained to do so, but these cases are not in point where the question involved relates to the sufficiency of a complaint filed by a receiver.

In answer to this objection it is urged by the appellee that this suit was not prosecuted by the receiver in his own name, but that it was prosecuted in the name of the Ladoga Creamery Company by the receiver.

In response to the position assumed by the appellee it must be said that the receiver, when appointed, succeeded to all the rights of the Ladoga Creamery Company, and he

Ingerman, Drainage Commissioner, v. The State, *ex rel.* Conroy.

alone, under the orders of the court, could maintain an action for the enforcement of such rights. The right of the company to sue was suspended so long as there was an acting receiver. Beach Receivers, section 663; *Coope v. Bowles*, *supra*; *Griffin v. Long Island R. R. Co.*, 102 N. Y. 449; *Curtis v. McIlhenny*, 5 Jones Eq. (N. C.) 290.

The cause was tried by the court who, at the request of the parties, made a special finding of the facts in the cause. It is not found that the receiver obtained an order of the court to commence and prosecute this action.

This being a suit involving a collateral matter, in our opinion the complaint in this case is fatally defective in failing to allege that the receiver obtained an order of the court appointing him to institute this suit before the action was commenced.

Having reached this conclusion it is unnecessary to examine the other questions presented by the record.

Judgment reversed, with directions to the circuit court to grant a new trial.

Filed April 30, 1891.

No. 14,879.

INGERMAN, DRAINAGE COMMISSIONER, v. THE STATE, EX
REL. CONROY.

128	226
156	4

MANDAMUS.—*Ministerial Officer.*—*Specific Fund.*—*Distribution of.*—A ministerial officer, who has a specific fund in his hands, may be compelled by mandamus to make lawful distribution of the fund. This remedy is proper, for the reason that the officer is liable, if liable at all, for the violation of a duty imposed upon him by law.

SAME.—*Drainage.*—*Ditch Commissioner.*—*Cost of Improvement.*—*Must Pay Out of Specific Fund.*—*Demand before Suit.*—*Parties to the Action.*—Where a ditch commissioner has collected the assessments levied for the construction of a ditch, it is his duty, upon proper demand, to pay the amount

VOL. 128.—15

Ingerman, Drainage Commissioner, v. The State, *ex rel.* Conroy.

due for the construction of the ditch out of the specific fund. In a mandamus proceeding to compel him to do so, he can not successfully urge as a reason for withholding the fund that the land-owners who paid the assessments which created the fund are not parties to the action.

SAME.—Petition for.—Necessity of Demand.—Public Officer.—Presumption as to.—In such an action a demand is essential. The presumption is that an officer will do his duty upon request, and to put him in the wrong a demand is necessary. Where the duty is owing to a private person, and not to the public, a demand must be alleged with precision in the petition for a writ of mandamus.

From the Hamilton Circuit Court.

R. R. Stephenson and W. R. Fertig, for appellant.

J. R. Gray, A. F. Shirts and M. Vestal, for appellee.

ELLIOTT, J.—The petition of the relator, wherein he prays that a writ of mandamus be issued against the appellant, contains these material allegations: That Ingerman is the duly appointed and acting ditch commissioner; that as such commissioner he entered into a contract with the relator for the construction of a public ditch; that the relator performed his part of the work so far as the appellant permitted him to do without cessation; that work was for a time stopped by order of the appellant, but was afterwards resumed by the appellant's order and carried to completion; that the appellant collected assessments levied for the construction of the ditch in the sum of \$3,303.10, and has disbursed \$2,913.71, leaving in his hands the sum of \$389.39; that there is due to the relator and unpaid the sum of \$327.39.

We have given an outline only of the material allegations of the complaint, but the questions we feel called upon to decide require nothing more.

The first question that we are required to decide is whether the relator has mistaken his remedy. The appellant's contention is that the remedy is not the appropriate one, for the reason that mandamus will not lie where nothing more than the enforcement of a contract is sought. We fully agree that mandamus is not the appropriate remedy for the enforcement

Ingerman, Drainage Commissioner, v. The State, *ex rel.* Conroy.

of a contract, but we can not agree that this is simply an action to recover upon a contract. We regard the case as one of a radically different character. The case is that of a ministerial officer, with money in his hands, which it is his duty to pay to the party entitled to it under the law. The fund in the appellant's hands was derived from an assessment made for a specific purpose, and the relator, as the contractor who constructed the ditch for which the assessments were levied, has a right to compel the appellant to distribute to him the fund as the law directs. The case before us falls within the rule that a ministerial officer who has in his hands a specific fund may be compelled by mandamus to make lawful distribution of the fund. *Portland Stone-Ware Co. v. Tayler* (R. I.), 19 Atl. R. 1086; *Board, etc., v. People, ex rel.*, 24 Ill. App. 410; *Case v. Wresler*, 4 Ohio St. 561; *Illinois State Hospital, etc., v. Higgins*, 15 Ill. 185; *United States, ex rel., v. Board, etc.*, 28 Fed. Rep. 407; *State, ex rel., v. Board, etc.*, 4 Ind. 495.

In this instance there is no question of contract liability; the question is as to the duty of the appellant to distribute to the relator the specific fund derived from the assessments levied to pay for the construction of the public ditch. The officer has no right to the specific fund, and he is liable, if at all, because he violates his duty in withholding the specific fund from the party entitled to it. He is not liable, upon the facts stated in the petition, to an action for a breach of contract duty, but he is liable, if liable at all, because he violated a duty imposed upon him by law. Such cases as *State, ex rel., v. Trustees*, 114 Ind. 389, are not relevant to the point here in dispute, since the liability of the appellant is not upon contract, but his liability arises out of a failure to distribute a specific fund in his hands as the law requires.

Confessing, as the appellant does by his demurrer, that he has the specific fund in his hands, and that the relator is entitled to it under the law, he can not successfully urge as a reason for withholding the fund, that the land-owners who

Ingerman, Drainage Commissioner, v. The State, *ex rel.* Conroy.

paid the assessments which created the fund are not parties to the action. He has the fund—the assessments have been paid—and it is his duty, upon proper demand, to pay the relator the money due him out of the specific fund. There is no merit in his contention that the land-owners should be parties, for nothing remains for him to do except to make proper distribution of the specific fund realized from the assessments.

There is a fatal defect in the petition and alternative writ. No demand is shown, and in such a case as this a demand is essential. The presumption is that an officer will do his duty upon request, and to put him in the wrong a demand is essential. *Jackson School Tp. v. Farlow*, 75 Ind. 118. A claimant of a fund can not maintain such an action as this without first demanding payment of his claim. The authorities are well agreed that where the duty is owing to a private person, and not to the public, a demand must be alleged with precision in the petition for a writ of such an extraordinary character as that invoked by the relator. *State, ex rel., v. Slick*, 86 Ind. 501; *Oroville, etc., R. R. Co. v. Supervisors, etc.*, 37 Cal. 354; *Board, etc., v. Arrghi*, 51 Miss. 667; *State, ex rel., v. Shaack*, 28 Minn. 358; *State, ex rel., v. Davis*, 17 Minn. 429; *Lee County v. State, ex rel.*, 36 Ark. 276. Many cases are cited in 14 Am. and Eng. Encyc. of law, p. 106.

Judgment reversed.

Filed May 1, 1891.

Orr et al. v. Owens.

No. 14,930.

ORR ET AL. v. OWENS.

REAL ESTATE.—Sale on Execution.—Action to Recover.—Within what Time Must be Brought.—Section 293, R. S. 1881, Applies to Void Sales.—Where land was sold under a decree of foreclosure by a sheriff without the county in which he holds office, and in due time a sheriff's deed was executed to the purchaser, and under that purchase he entered into possession of the land, and held it for more than ten years under his sheriff's deed, before a suit was instituted to recover the land, the action for recovery is barred by the statute of limitations. Section 293, clause 3, R. S. 1881, providing that an action can only be brought by the execution debtor to recover real property sold on execution within ten years from the day of sale, applies to sales where there was an entire want of jurisdiction in the court to order the sale of the property.

From the Jackson Circuit Court.

W. K. Marshall, for appellants.*J. M. Lewis* and *B. H. Burrell*, for appellee.

MILLER, J.—This was an action brought by the appellants against the appellee to quiet the title to a tract of land in Scott county, in which county the action was originally instituted.

The ruling of the court in overruling a demurrer to the second paragraph of the answer, is the only error assigned in this court.

It appears from the answer that the owner of the land in controversy executed a mortgage on this, with other lands, situate in Jackson county, to secure the payment of a note; that afterwards the mortgage was foreclosed in the common pleas court of Jackson county, and the land sold upon the decree by the sheriff of Jackson county, at the court-house, in Jackson county. This sale was made in contravention of the provisions of the statute. 2 G. H., p. 249, section 466 (section 756, R. S. 1881). *Holmes v. Taylor*, 48 Ind. 169; *Jenners v. Doe*, 9 Ind. 461.

The purchaser paid the purchase-money, and in due course

128	229
128	213
128	369
128	229
139	205
128	229
147	147
128	229
156	622
156	623

Orr *et al.* v. Owens.

of time received a sheriff's deed, and entered into possession of the land under his purchase. That the purchaser, and those claiming under him, have been in the undisturbed possession of the land, claiming title under the purchase for more than ten years prior to the commencement of this suit, and that they have made lasting and valuable improvements upon the land.

The appellants claim title under the original mortgagors.

The only question discussed by counsel is as to the effect of the statute of limitation. Section 293, clause 3, R. S. 1881.

The counsel for the appellants concedes the general rule to be, that an action can only be brought by the execution debtor to recover real property sold on execution within ten years from the day of sale, but contends that this sale, being without the county in which the sheriff held office, was not, in reality, a sheriff's sale. That being extra-territorial, and without his bailiwick, it was absolutely void; that the statute was intended to protect purchasers where there is merely a defective execution of a power, but not where there is an entire non-execution of it.

We are unable to agree with counsel in their construction of this statute. In construing this section of the statute of limitations, in the case of *Brown v. Maher*, 68 Ind. 14, the court says: "The statute clearly applies to the case before us. It applies to void sales. If it did not, it would be a dead letter; for, if sales are not void, the purchaser needs no statute of limitations to protect his title." And in *White v. Clawson*, 79 Ind. 188, this language is used with reference to another clause in this section:

"Nor did the averment that the guardian's sale was void add anything to it. The statute upon which the defence was based is a statute of repose, and it is not necessary that a person shall have a good title to invoke its aid. Such persons do not need it. It is only those who can not assert a good title. It protects those who hold under void sales."

Small, Receiver, v. The City of Lawrenceburgh *et al.*

In *Wright v. Wright*, 97 Ind. 444, a suit by a married woman to recover land sold in violation of a statute, was held to be barred because not brought within ten years from the day of sale.

In *Second National Bank v. Corey*, 94 Ind. 457, an action to recover land advertised and sold by a sheriff by a description so defective and insufficient as to be void, was barred after ten years.

Also, in actions where there was an entire want of jurisdiction in the court to order the sale of property. *Vancleave v. Milliken*, 13 Ind. 105; *Vail v. Halton*, 14 Ind. 344; *Gray v. Stiver*, 24 Ind. 174.

The answer informs us that this land was sold by a sheriff, and that in due time a sheriff's deed was executed by the sheriff to the purchaser. And that under that purchase he entered into possession of the land, and held it for more than ten years under his sheriff's deed. This gave him and those claiming under him the right of protection afforded by the statute.

The court did not err in overruling the demurrer to the second paragraph of answer.

Judgment affirmed.

Filed April 30, 1891.

No. 15,645.

**SMALL, RECEIVER, v. THE CITY OF LAWRENCEBURGH
ET AL.**

BANKS AND BANKING.—*Bank Stock.*—*Taxation of.*—*Assessment in Name of Bank.*—*Effect of.*—*Excessive Assessment.*—*Remedy.*—Where bank stock is assessed and a valuation put upon it by the proper officer, and an entry made of the assessment upon the tax duplicate, the fact that the assessment was made in the name of the bank, instead of the individual stockholders, will not invalidate the lien, or relieve the respective stock-

128	231
129	72
128	231
130	599

Small, Receiver, v. The City of Lawrenceburgh *et al.*

holders from the payment of the tax for which it is liable. If the parties were aggrieved on account of being assessed with a greater amount than should have been charged against them, they had a remedy by appearing before the city board of equalization.

From the Dearborn Circuit Court.

H. D. McMullen, W. R. Johnston and H. R. McMullen,
for appellant.

W. N. Hauck, for appellee.

OLDS, C. J.—The appellant brought this suit against the appellees to enjoin the collection of certain taxes. The court sustained the separate demurrers of the appellees to the complaint, to which rulings the appellant excepted, and refused to plead further, and the court rendered judgment, on demurrer, for the appellees. The rulings, in sustaining the separate demurrers of the appellees to the complaint, are assigned as error. It is shown by the averments in the complaint that on and prior to April 1, 1883, there existed in the city of Lawrenceburgh a national bank, known and designated as the City National Bank of Lawrenceburgh, Indiana, said bank having been regularly organized, and was being operated under the laws of the United States. The capital stock of the bank was one hundred thousand dollars, divided into 1,000 shares of \$100 each. On April 1st, 1883, Dewitt C. Fitch owned 787 shares of the capital stock of said bank, and Henry C. Fitch owned 60 shares of said capital stock; that on said date said bank was largely indebted, and the capital stock was, in fact, of no value; that between the 1st day of April and the 1st day of June, 1883, the assessor for the city of Lawrenceburgh assessed to and against the said bank the entire amount of said capital stock at its full face value, without designating any portion of the same as being owned by any particular owner, and the same was placed on the city tax duplicate for said year as an assessment against said bank, the tax assessed upon the same against the bank being \$1,143.45, which so remained upon

Small, Receiver. v. The City of Lawrenceburgh *et al.*

said duplicate up to July, 1884; that on the 2d day of August, 1883, Dewitt C. and Henry Fitch assigned, conveyed, transferred and delivered all their property, real and personal, except said bank stock, to said bank, and on the same day they each assigned the said bank stock so owned by them respectively to Leah Fitch, wife of Dewitt C. Fitch; that afterwards the creditors of the bank, and of said Henry and Dewitt C. Fitch commenced suit to set aside said transfers as fraudulent and void, and on the final adjudication in said cause, in February, 1884, said transfers were set aside, and said appellant was appointed receiver; that in July, 1884, the city clerk of said city of Lawrenceburgh changed said tax duplicate of 1883, as to the said stock assessed to said bank, by writing therein under such assessment the words "Transferred to stockholders, July 1884," and by adding \$6,000 to the taxable property of said Henry Fitch, and \$78,700 to the taxable property of said Dewitt C. Fitch on the duplicate without designating the kind of property on account of which said sums were added to the assessments of said Fitch and Fitch, and without any notice to the appellant, and without the knowledge or consent of said Fitch and Fitch; that Fitch and Fitch were each respectively indebted, on the first day of April, 1883, in a sum in excess of the amount of the stock so owned by them; that the bank owned real estate, on said first day of April, 1883, of the value of \$5,000, and which was assessed against the bank at \$3,850; that by the decree of the court the appellant was authorized to sell the real estate of Fitch and Fitch, which was situate in said city of Lawrenceburgh, free from all liens of taxes, and he has sold the same in accordance with said order, and has in his hands money sufficient to pay all legal taxes; that said taxes so assessed on account of said bank stock, together with the interest and penalties is still upon the tax duplicate of said city, which duplicate has been placed in the hands of, and is now in the hands of, the treasurer of said city, and the appellees claim and assert that the same is a legal and valid tax and

Small, Receiver, v. The City of Lawrenceburgh *et al.*

lien against said real estate so owned by said Fitch and Fitch, so sold by the appellant, and is a cloud upon the title to the same; that appellant has paid, and offered to pay, and tendered to the said city treasurer all taxes against all other property of Fitch and Fitch; that said city treasurer threatens to, and will, unless restrained, advertise and sell said real estate.

The property, the bank stock, owned by Fitch and Fitch, was assessed by the proper officer, and the value, being the par value, was fixed by the officer, but it was erroneously entered upon the books in the wrong name, being assessed to the bank instead of the owners of the stock; afterwards the amount was separated, and the proper amount owned by each stockholder charged to each of them respectively. The property was owned by the parties, Fitch and Fitch, on the first day of April, 1883, and was subject to taxation, and being assessed by the proper officer, the lien for taxes attached. *Evansville, etc., R. R. Co. v. Hays*, 118 Ind. 214.

The averments that the property was of no value, and that the owners were entitled to deductions on account of indebtedness, are of no avail in this proceeding. The assessor was charged with the duty of fixing the value on the property. Sections 3071 and 3072, R. S. 1881. And if the parties were aggrieved on account of being assessed with a greater amount than should have been charged against them, they had a remedy by appearing before the city board of equalization. Section 3157, R. S. 1881; *Board, etc., v. Senn*, 117 Ind. 410; *Wattles v. City, etc.*, 40 Mich. 624; *People, ex rel., v. McCarthy*, 102 N. Y. 630; *Illinois, etc., Coal Co. v. Stookey*, 122 Ill. 358; *Camp v. Simpson*, 118 Ill. 224.

The property having been owned by Fitch and Fitch on the 1st day of April, 1883, and being assessed by the assessor, they became liable for the taxes chargeable against the stock the same as any other property owned by them, and they can not enjoin its collection on account of the entry being made upon the books against the bank instead of

Spidell *et al.* v. Johnson *et al.*

against them individually. Provision is made by statute for the assessment of bank stock, the same as any other property, and authorizes the president, cashier, or proper officer, to pay the taxes assessed against the same, and to deduct the amount so paid from any dividends due on such stock. Sections 3254 to 3260, R. S. 1881, inclusive; also section 6345. The proper steps were taken in this case to fix the lien for taxes upon the stock. It was assessed, and a valuation put upon it by the proper officer, and an entry made of the assessment upon the tax duplicate, and the fact that the assessment was made in the name of the bank, instead of the individual stockholders, will not invalidate the lien, or relieve the respective stockholders from the payment of the tax for which it is liable.

There was no error in sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

MILLER, J., took no part in the decision of this case.

Filed May 1, 1891.

No. 15,325.

SPIDELL ET AL. v. JOHNSON ET AL.

GRAVEL ROAD.—*Construction of.*—*Issuance of Bonds for.*—*Action for Accounting Against County.*—*Bondholders May Maintain.*—*Extent of Equity Relief.*—Proceedings were instituted to construct a free gravel road. Assessments were made on the contiguous lands, and coupon bonds were sold to the plaintiffs, who paid the full face value thereof, to raise money for the construction of the road. The money arising from the sale of the bonds was paid into the general fund of the county. Separate suits were afterwards instituted by certain land-owners to enjoin the county officers from placing the several amounts assessed against their respective tracts of land on the tax duplicate, and to declare their assessments void. The proceedings to restrain the officers were sustained in the court below, and several judgments were rendered according to the

128	235
132	29
128	235
147	508
128	235
148	474
128	235
153	257
128	235
154	516
156	554

Spidell et al. v. Johnson et al.

prayer of the complaint. An appeal was taken in one of the cases, and the judgment was reversed. The bondholders were not parties to these proceedings, and had no notice of their institution.

Held, that the bondholders could maintain an action in equity against the county and its officers for an accounting of the money which had been received from such assessments, and which it was alleged had gone into the general fund of the county, and have the same applied to the liquidation of the bonds, together with the interest due thereon.

Held, also, that the bondholders could compel the officers who were charged with the duty of collecting the assessments to place on the tax duplicate the assessments which had been set aside.

Held, also, that where a court of chancery takes jurisdiction of a cause for any purpose, it retains it under its control for all purposes, and administers complete relief, as the justice of the case may require.

From the Ripley Circuit Court.

J. K. Thompson, J. R. Cravens and N. Cornet, for appellants.
W. G. Holland, J. B. Rebuck, A. Stockinger and C. K. Bagot, for appellees.

MITCHELL, J.—Out of a great mass of irrelevant matter the following material facts may be extracted from a complaint to which a demurrer was sustained in the court below.

Certain proceedings were instituted before the board of commissioners of Ripley county, in the year 1884, for the construction of a free gravel road, which was to be known as the Versailles and Dillsboro Turnpike. The proceedings resulted in the making of assessments on the contiguous lands, as provided by law, and in the issuing of thirty coupon bonds of the denomination of \$500 each upon which to raise money for the construction of the road. The bonds were duly negotiated and sold to the appellants, who paid the full face value therefor, the money paid going into the general fund of the county. It appears that after the bonds had been sold, and the money received by the county, certain persons whose lands had been assessed in order to raise

Spidell et al. v. Johnson et al.

money to defray the cost of the improvement, instituted separate suits to enjoin the auditor, treasurer, and board of commissioners of Ripley county from placing the several amounts assessed against their respective tracts of land on the tax duplicate, and to declare the assessments void. The proceedings to enjoin the officers were sustained in the court below, and several judgments were rendered restraining the auditor and treasurer, according to the prayer of the complaint. In one of the cases in which judgment was so rendered, an appeal was taken to this court, and the judgment was reversed. *White v. Fleming*, 114 Ind. 560. In the other cases no appeals were taken, and the judgments remain in full force. The bondholders were not parties to those proceedings, and had no notice of their having been instituted.

It is charged in the complaint that some of the land owners, whose lands were assessed, have paid part of the amounts assessed into the treasury of the county, but that others refuse to pay anything, and that the officers of the county refuse to place, or continue, the assessments on the tax duplicate, or to collect the assessments, or to apply any of the money received by the county to the payment of the bonds held by the plaintiffs below, which are now due and remain unpaid.

It is also charged that the county has, through its board of commissioners and officers, appropriated about \$8,000 of the money received from the sale of the bonds to the use of the county. The relief prayed is that the board of commissioners and officers of the county be compelled to account for all moneys received from the sale of bonds and from assessments, and that they be required to apply the amount applicable to that purpose which remains in the general fund of the treasury, to the payment of the bonds and the interest coupons thereon. There is also a prayer that the judgments enjoining the officers from collecting the assessments on the land benefited be declared void as to the plaintiffs, and that the officers of the county be required to proceed to place the

Spidell *et al.* v. Johnson *et al.*

amounts assessed on the tax duplicate, and that a sufficient amount be collected from the assessments to pay any deficiency that may remain in order to satisfy the bonds and interest coupons due thereon, after applying to that purpose what may be found due from the county.

The facts stated in the complaint invoke the chancery jurisdiction of the court for an accounting by the officers and commissioners of Ripley county with the appellants, in respect to an alleged fund which the latter claimed should in equity be applied to the payment of the bonds held by them.

The proceedings for the construction of the public enterprise in question having resulted in fixing a lien on the lands adjudged to be benefited by the construction of the free turnpike, the lien thus fixed stood as a security for the payment of the bonds which were issued for the purpose of obtaining the money with which to carry forward the work.

Bonds such as those in question are not the obligations of the county. *Strieb v. Cox*, 111 Ind. 299. The lien fixed by statute upon the lands benefited constitutes a security for the benefit of the bondholders.

Unless the proceedings which resulted in creating the lien which constituted the sole security for the bondholders was absolutely void, the security thereby afforded could not be destroyed, impaired or rendered unavailing without affording an opportunity to those interested to be heard. There is no pretence that the proceedings were void. The judgments restraining the officers of Ripley county from enforcing the assessments having, as it were, cast a cloud upon the security of the bondholders, they had the right to appeal to a court of equity to protect their property. Besides, some of the land-owners having paid in part, and others having paid nothing, and the whole matter having fallen into a state of confusion, a court of law was not adequate to the task of unraveling the "tangled skein," and it was therefore peculiarly a subject for the chancery side of the court, to account with the county and its officers, to reinstate the lien of the as-

Spidell *et al.* v. Johnson *et al.*

sessments so far as the judgments theretofore rendered had embarrassed the officers of the county in collecting what might be needed to pay off the bonds and interest.

The rule is, that where a court of chancery takes jurisdiction of a cause for any purpose, it retains it under its control for all purposes and administers complete relief as the justice of the case may require. *Faught v. Faught*, 98 Ind. 470 (472).

When a chancery court acquires jurisdiction for any purpose, it will, as a general rule, proceed to determine the whole cause, although in so doing it may decide questions which standing alone would furnish no basis of equitable jurisdiction. Bispham Equity, section 37.

It is quite true that the county can not be held for any part of the cost of constructing a free turnpike, nor can it be made accountable for any loss resulting from the errors or neglect of its officers. *Board, etc., v. Fullen*, 111 Ind. 410. The complaint, however, does not seek to hold the county liable for the conduct of its officers. It only seeks an accounting with the county and its officers for the money which is alleged to have gone into the general fund of the county, and which in equity and good conscience should be applied to the payment of the bonds. Let there be an account taken with the county and its officers, and if it is found that the facts stated in the complaint are true, then the money covered into the general fund of the county belonging to the free turnpike fund should be made available for the purpose of paying the bonds issued in order to obtain money with which to construct the work. *Vigo Tp. v. Board, etc.*, 111 Ind. 170. So if it be found true, as is alleged, that a valid lien had attached for the security of the appellants which has been obscured or impaired by a judgment, or by judgments to which the bondholders were not parties, the officers whose duty it is to collect the assessments should be ordered to proceed as the statute requires to place the amount assessed upon the lands benefited upon

The Board of Comm'rs of Gibson Co. v. The Cincinnati Steam Heating Co.

the tax duplicate to the end that those who have not paid may be required to pay according to law.

The court erred in sustaining the demurrer to the complaint.

Judgment reversed, with costs.

BERKSHIRE, C. J., did not participate in the decision of this cause.

Filed Nov. 20, 1890; petition for a rehearing overruled May 12, 1891.

No. 13,861.

THE BOARD OF COMMISSIONERS OF GIBSON COUNTY v. THE
CINCINNATI STEAM HEATING COMPANY.

STATUTE OF FRAUDS.—*Building Contract.—Agreement Between Owner and Sub-Contractor.—Collateral Contract.*—Where the owner of property undertakes to pay for work and materials to be subsequently done and furnished by a sub-contractor in order to secure the completion of a building where the principal contractor has failed to carry on the work, the promise is an original one, and not within the statute of frauds, and is enforceable.

COUNTY COMMISSIONERS.—*Erection of Court-House.—Minor Changes Without Plans or Specifications.—Power of Commissioners to Make.—Presumptions.*—Under section 4243, R. S. 1881, requiring plans and specifications for the construction of public buildings to be prepared and filed before advertising for proposals, a board of county commissioners may make a change in a matter of detail, such as the heating or lighting of a court-house, in process of erection, without requiring plans and specifications of the proposed change to be filed, and without advertising for proposals for the same. No important general change in the plan of the building can be thus made, only changes in matters of detail. It must be presumed that the board of commissioners neither violated the law, nor acted in bad faith in ordering changes in a matter of detail, and in the absence of countervailing facts, it must be also presumed that the changes were of such minor importance and so necessary that it was not only the right of the board to order them made, but that it was its duty to cause them to be made.

128	240
141	600
128	240
158	480

The Board of Comm'rs of Gibson Co. v. The Cincinnati Steam Heating Co.

From the Knox Circuit Court.

L. C. Embree, for appellant.

M. W. Fields and *J. W. Ewing*, for appellee.

ELLIOTT, J.—On the 25th day of September, 1883, the board of commissioners of Gibson county entered into a contract with Joseph G. Miller for the erection of a court-house. The plans and specifications were adopted at a meeting of the board on the 7th day of August, 1883, and notices inviting proposals for building the court-house were published for more than six weeks prior to the time the contract was awarded. The notice was published in a newspaper of general circulation in the county of Gibson. Miller entered upon the work under the contract, and on the 29th day of December, 1884, made a contract with the appellee to furnish a steam heating apparatus and appliances for the court-house. The plans and specifications agreed upon by Miller and the appellee were different from those adopted in the first instance by the board of commissioners, but what the differences were does not appear. The appellee entered upon the work required by its contract and furnished labor and material. On the first day of April, 1885, it received from Miller, in part payment, three thousand dollars, and on the 20th day of June of that year there was owing from Miller to the appellee the sum of two thousand and two hundred dollars; this sum Miller failed to pay, although it had been due for more than two months. The architects, McDonald & Bro., refused to issue an estimate, and the appellee tendered to the board a bond conditioned as follows:

“The condition of this obligation is such, whereas the said Cincinnati Steam Heating Company has a contract with one Joseph G. Miller, who is chief contractor for the erection of a court-house in Gibson county, Indiana, to place certain steam heating apparatus in said court-house, for which it is to receive the sum of \$6,665 in installments

The Board of Comm'rs of Gibson Co. v. The Cincinnati Steam Heating Co.

equal to eighty-five per cent. of the value of the work done and material furnished as said job shall progress, and as there is now due to it the sum of \$2,200, on said work on said contract, which said Miller has failed to pay, the said commissioners having refused to advance any more direct to said Miller on his said contract, but being willing and desirous of advancing to the said The Cincinnati Steam Heating Company direct the money now due, and to become due for its said work upon the approval of said architects, and propose to advance at once, at next meeting of said commissioners, the \$2,200 aforesaid; now, therefore, if the said The Cincinnati Steam Heating Company shall complete its said job of work in accordance with the plans and specifications and terms of its said contract, and the work so completed shall be accepted by the McDonald Brothers, these presents shall be void, otherwise to remain in full force and virtue."

The board accepted the bond while in session but made no entry of record. After the acceptance of the bond the board caused a warrant to issue to the appellee on which it received two thousand two hundred dollars. The order directing the warrant to issue reads thus: "Comes now Kenneth McDonald, architect on new court-house, and files estimate for work done and materials furnished for steam heating in the sum of twenty-two hundred dollars by Joseph G. Miller, the estimate having been assigned to the Cincinnati Steam Heating Company, and also showing that Joseph G. Miller has been previously paid the sum of \$80,679, and making a total allowance of \$82,879, and after hearing the evidence, and being fully advised, it is found that said claim ought to be allowed. It is now ordered that the Cincinnati Steam Heating Company be allowed the sum of twenty-two hundred dollars."

The appellee fully performed its part of the contract, and on the 20th day of December, 1885, demanded an estimate, but the architect refused to certify one. On the 1st day of

The Board of Comm'rs of Gibson Co. v. The Cincinnati Steam Heating Co.

February, 1886, the board entered an order declaring the court-house completed and ready for occupancy, and, pursuant to such order, possession was taken by the county officers and the records placed in the building. The county, by its officers, occupies the court house and uses the steam heating apparatus placed in it by the appellee. On the 14th day of April, 1886, the appellee presented its claim for the remainder due upon its contract, but its claim was rejected. There remains owing the appellee the sum of fourteen hundred and sixty-five dollars.

The appellants' counsel contends that the board had no authority to contract for the steam heating apparatus, for the reason that no plans and specifications were ever placed on file in the auditor's office, and no notice was published inviting proposals for furnishing the court-house with steam heating apparatus. This contention is based upon the provisions of the statute requiring plans and specifications for the construction of public buildings to be prepared and filed before advertising for proposals. Section 4243, R. S. 1881. We can not accept the views of counsel as correct. In our opinion the statute was not intended to prevent changes in plans and specifications from being made in cases where it becomes apparent in the progress of the work, that changes are required. We do not mean to be understood as holding that changes in the general plan of the work may be made at the pleasure of the board of commissioners, but we do mean to adjudge that changes may be made in details and in minor particulars. If the rigid rule for which the appellant contends were adopted, then the board could not change a window, a door, a chimney, or any like matter, and, certainly, the Legislature did not mean to establish a rule that would prevent such changes. Of course, no important general change in the plan of the building can be made, but a change in a matter of detail, such as the heating or lighting, may be rightfully made when required. If the board of commissioners secures and files plans and specifications so full and

The Board of Comm'rs of Gibson Co. v. The Cincinnati Steam Heating Co.

specific as to show the character of the proposed building, and duly advertises for proposals, the county can not escape liability without showing that changes in important particulars were made. This conclusion is fairly supported by the case of *Bass Foundry, etc., v. Board, etc.*, 115 Ind. 234.

Neither the county nor its officers can with reason or justice ask that it shall be presumed that the board of commissioners either violated the law or acted in bad faith in ordering changes in a matter of detail, such as that of heating a court-house; on the contrary, the presumption is that what was done was done rightfully and in good faith. It must, therefore, be presumed, in the absence of countervailing facts, that the changes respecting the steam heating apparatus were of such minor importance and so necessary that it was not only the right of the board to order them made, but that it was its duty to cause them to be made. The county is using and enjoying the property placed in its possession by the appellee in good faith, and the least that it can do if it would keep and enjoy the property without paying for it, is to show such facts as make it clearly appear that the acts of its board of commissioners were unauthorized or illegal.

It is argued with ability and plausibility that there was no promise on the part of the board of commissioners to pay the appellee for the heating apparatus. In our judgment the contention, plausible as it is, can not prevail. The facts surrounding the parties when the bond was accepted by the commissioners furnish the light by which the contract must be read. The county was unwilling to pay anything more to Miller, the principal contractor; it had already paid on account of the heating apparatus a considerable sum of money; it was willing to pay the appellee the "sum due and to become due;" the appellee was willing to complete the work and gave bond that it would do so. It can hardly be doubted that the parties meant that one should do the work and that the other should pay for it when it was done. The one did do the work and the other has received the

The Board of Comm'rs of Gibson Co. v. The Cincinnati Steam Heating Co.

benefit. It must be implied that one should receive compensation and if this be the implication, then there is an implied promise. It is said, however, that the writing simply expresses a desire to advance money and does not even express a desire or willingness to pay money, but this certainly is a forced and unnatural construction of the language employed by the parties. It is not reasonable to infer that the commissioners understood that all that the appellee expected was "a desire to advance money," nor is it reasonable to infer that the appellee agreed to do work for any such a consideration. The cases of *Harmon v. James*, 7 Ind. 263, and *Johnston v. Griest*, 85 Ind. 503, lend appellant no support, for in these cases no consideration was shown, while here a full and valuable consideration appears. Here, there is a consideration fully expressed; in those cases there was none. The case before us is not ruled by the cases named, but by the principle asserted in *Long v. Straus*, 107 Ind. 94. It is important to mark the fact that not only did the appellee promise the appellant to do the designated work, but that it also gave bond with surety that it would do the work as promised. There was a promise for a promise, there was value previously received, and there was a bond covenanting that what was promised should be performed. No lack of consideration can be justly asserted, for the new bond executed direct to the appellant was itself a consideration, but it was not by any means the only consideration yielded by the appellee. We are satisfied that there was a promise upon a valid consideration moving to the promisor.

We are required to decide whether the promise is within the statute of frauds. If it is an original and not a collateral promise, then it is not within the statute. If it is not an original promise it is within the statute, for it is well settled that a contract not entirely in writing is verbal, and, therefore, voidable under the statute requiring collateral contracts to be evidenced by writing. There is here no written promise on the part of the appellant, although there

The Board of Comm'rs of Gibson Co. v. The Cincinnati Steam Heating Co.

is a verbal assent to a written proposition of the appellee. *Higham v. Harris*, 108 Ind. 246; *Tomlinson v. Briles*, 101 Ind. 538; *Hackleman v. Board, etc.*, 94 Ind. 36; *High v. Board, etc.*, 92 Ind. 580; *McCurdy v. Bowes*, 88 Ind. 583 (585); *Board, etc., v. Miller*, 87 Ind. 257; *Gordon v. Gordon*, 96 Ind. 134; *Pulse v. Miller*, 81 Ind. 190; *Board, etc., v. Shipley*, 77 Ind. 553.

The promise of the appellant is an original and not collateral one. The consideration for the promise moved to the appellant, for it obtained a bond securing the performance of the contract, and obtained, also, the materials and labor of the appellee. The benefit accrued to the owner, and not to the original contractor. For what the owner received and retained it was bound in equity and good conscience to pay. *Bass Foundry, etc., v. Board, etc., supra*. The appellant did not promise to pay for property received by Miller; its promise was to pay for property received by the county itself. The work was not completed when the promise was made, and Miller was not the debtor for the work that had not been done, however it may be as to the work that had already been performed. But even as to the work that had been done prior to the new promise, Miller was not the ultimate beneficiary from it, for, in the end, the benefit was the county's. The new promise secured the completion of the work, and this consideration directly and beneficially moved to the appellant. The new bond was an additional consideration, so that there was a complete and valuable new and additional consideration. The consideration yielded secured a new promise, and that promise was to do work for the promisor, and work, too, which was for its sole benefit. The appellant made no promise to answer for the debt or default of Miller, nor did it undertake to pay for property delivered to him. What the appellant did promise to do was that it would pay the appellee for work done in improving its property and fitting it for use and occupancy. This new promise was not collateral to any anterior undertaking, for it was not

The Board of Comm'rs of Gibson Co. v. The Cincinnati Steam Heating Co.

to pay another's debt, nor was it to pay for property delivered to another, or for services rendered for another; on the contrary, the promisor was the sole beneficiary, and it was seeking to obtain value for itself and no one else. It seems clear that justice requires that the county should pay what it promised, for its promise was for its own benefit, and all of value that the promise secured accrued directly and completely to it as the owner of the property.

The principle which the well-reasoned cases establish is this: Where the owner of property undertakes to pay for work and materials to be subsequently done and furnished by a sub-contractor in order to secure the completion of a building in a case where the principal contractor has failed to carry on the work, the promise is an original one, and not within the statute of frauds. This principle is intrinsically just, and its enforcement does not in the slightest degree tend to the mischief the statute of frauds and perjuries was intended to repress. In the well-reasoned case of *Emerson v. Slater*, 22 How. 28, the Supreme Court of the United States gave the subject full consideration, and held that a promise similar to that made by the appellant was enforceable. It was there said: "But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." It is possible that the language quoted states the doctrine rather too broadly, but we shall not inquire whether it does so or not, for here we are not required to decide what the rule is where the promise relates to the past, inasmuch as we are concerned only with what related to the future at the time the new promise was made. This is so because the only question in this case is whether the appellee is entitled to

The Board of Comm'rs of Gibson Co. v. The Cincinnati Steam Heating Co.

recover for work done and materials furnished after the new contract was made. If the claim asserted was to the sum owing before the new promise was made, there would, perhaps, be more difficulty in solving the legal problem, but the sum due when the new promise was made was paid, so that the controversy concerns only the right to recover the sum that subsequently became due for work done and materials furnished. We do not decide, we may say, by the way, that the sum due might not be recovered under the new promise had it not been paid; we simply decide the question before us, and that relates to matters that at the time the new promise was made concerned the future, and not the past. The promises were in their nature severable, and the valid promise may certainly be enforced. *Lowman v. Sheets*, 124 Ind. 416.

Resuming our consideration of the decided cases bearing directly upon the questions before us, we take up that of *Sext v. Geise*, 80 Ga. 698, where an owner promised to pay for materials furnished to complete a building then in progress of construction, and where it was said: "If the supply of lumber was about to stop and the owner of the building procured its continuance by promising to pay for it, his undertaking was not collateral but original, and he is bound." Another case is that of *Kutzmeyer v. Ennis*, 27 N. J. L. 371, where the court said, speaking of the owner of a building: "He was interested in the completion of the work. He received the benefit of it, and he had it in his power to indemnify himself for the advance to Ennis by withholding the money from the contractors." In discussing a question which arose in a case very similar to the present, the Supreme Court of Vermont said: "If in this case a third person make an entire, substantive and independent contract with him to perform the same service this may be enforced though not in writing, as it is not collateral." But without quoting from the decisions, or commenting upon them, we cite some of them and affirm that our conclusion

The Board of Comm'rs of Gibson Co. v. The Cincinnati Steam Heating Co.

that the appellant's contract is original and not collateral, is sustained by the overwhelming weight of authority. *Yeoman v. Mueller*, 33 Mo. App. 343; *Crawford v. Edison*, 45 Ohio St. 239; *Clifford v. Luhring*, 69 Ill. 401; *Bayles v. Wallace*, 56 Hun, 428; *Hagadorn v. Stronach, etc., Co.*, 81 Mich. 56; *Galveston, etc., Co. v. Hourein* (Texas), 9 S. W. R. 661; *Greenough v. Eicholtz*, 1 Mon. (Pa.), 433; *Fitzgerald v. Morrissey*, 14 Neb. 198; *Young v. French*, 35 Wis. 111. Of the cases cited by the appellant the only ones in point are *Ellison v. Jackson, etc., Co.*, 12 Cal. 542; *Noyes v. Humphreys*, 11 Gratt. 636; *Ware v. Stephenson*, 10 Leigh, 155. The Virginia cases are out of line with authority, and so is the California case. The latter cites as authority a single case, that of *Puckett v. Bates*, 4 Ala. 390, and that case is in conflict with the later and better considered case of *Jolley v. Walker*, 26 Ala. 690.

Our own cases very clearly recognize the distinction between original and collateral contracts. The earlier cases are collected in *Anderson v. Spence*, 72 Ind. 315, and it was shown that the case of *Green v. Cresswell*, 10 A. & E. 453, which asserted a doctrine contrary to that here declared, had been overruled in England and denied in America. In *Palmer v. Blain*, 55 Ind. 11, it was held that a promise by a third person to an execution creditor that if the creditor would satisfy the execution he would pay the judgment, was not within the statute. A very similar decision was made in *Frash v. Polk*, 67 Ind. 55. In *Aughie v. Landis*, 95 Ind. 419, it was held that a promise by a defendant to pay for work which the plaintiff agreed to do for a third person was not within the statutory inhibition. The case of *Shaffer v. Ryan*, 84 Ind. 140, illustrates the difference between an original promise and a collateral one, as does, also, the case of *Hackleman v. Miller*, 4 Blackf. 322.

The case before us is not dependent upon the doctrine of novation, so that the cases of *Langford v. Freeman*, 60 Ind. 46, *Krutz v. Stewart*, 54 Ind. 178, *Crosby v. Jeroloman*, 37

Indiana Insurance Company v. Hoffman.

Ind. 264, and *Ellison v. Wisheart*, 29 Ind. 32, are not of controlling influence. It is not dependent upon that doctrine, for the manifest reason that what was done after the new promise was made was done for the promisor, for its benefit and at its request, and it is only for the value of what was so done that the appellee sues. As to the value of the work and materials furnished under the new promise the contract was one between the appellee and the appellant, and it did not concern any debt due from Miller to the former.

Judgment affirmed.

Filed May 14, 1891.

No. 15,195.

INDIANA INSURANCE COMPANY v. HOFFMAN.

INSURANCE — Loss by Fire.—Policy Construed.—Pro Rata Liability.—The plaintiff held a policy in the defendant company for \$1,500. The policy was on twenty-one items of property which were classified in the policy, and opposite each item a valuation was affixed, making, in the aggregate, \$90,000. The policy provided that the company only insured one-sixtieth part of each of said sums, and that its liability was limited to such a proportion of the loss as the amount insured thereby bore to the entire amount of insurance. At the time of the fire the aggregate insurance on the property was \$60,000, and the loss \$51,000.

Held, that under the terms of the policy the defendant company was liable for one-fortieth, and not sixtieth, of the loss.

From the Marion Superior Court.

V. Carter, for appellant.

N. Morris, L. Newberger and J. B. Curtis, for appellee.

MILLER, J.—This was an action brought by the appellee against the appellant on a policy of insurance. The complaint alleges an insurance by the appellee of \$1,500; that there was a total insurance of \$60,000, and a loss of \$51,-

128	250
128	572

Indiana Insurance Company v. Hoffman.

000, and claims that appellant's *pro rata* share of the loss was the one-fortieth, or \$1,275.

The only question presented by the record is as to the sufficiency of the third paragraph of answer.

This paragraph admits its liability for \$850, but claims that by the terms of the policy it was agreed that the plaintiff should carry and maintain the full sum of \$90,000 insurance on his property, and that it was to recover under the policy sued on one-sixtieth part of \$90,000 insurance; that the plaintiff, pursuant to the provisions and agreements in the policy, procured concurrent insurance amounting, with the one in suit, to \$90,000; that afterwards, and before the fire, the plaintiff, without the knowledge and consent of the defendant, cancelled \$30,000 of the insurance, so that at the time of the fire, there was only \$60,000; and that by reason of the reduction, the plaintiff became an insurer with the defendant for \$30,000. The answer admits that the loss was \$51,000, and that at the time of the fire the total insurance was \$60,000.

The appellant contends that its liability is fixed by the terms of the policy at the one-sixtieth of the loss, or \$850, and the appellee that its liability is for such proportions of the total loss, \$51,000, as the sum of \$1,500 bears to the whole amount of insurance existing at the time of the fire, being the one-fortieth, or \$1,275.

In that portion of the policy which is usually written out, there is attached a printed slip locating and describing the property insured as follows:

"On stone building marked 'A' on plan, including stone addition and stone stairway, house, \$10,000.

"On stone building marked 'B' on plan, including stone stairway, house, \$5,000."

Following these are nineteen other similar items of property, with corresponding amounts indicated on the right, and at the bottom the figures \$90,000 as the amount pro-

Indiana Insurance Company v. Hoffman.

duced by the addition of these various amounts, and containing in addition the following clause:

"It is understood and agreed that the Indiana Insurance Company, of Indianapolis, covers, under their policy to which this specification is attached and made a part thereof, one-sixtieth part of each of the above named sums, amounting in the aggregate to — (\$1,500) dollars."

It is also provided, in the condition attached to the policy, that if there is other insurance upon the property damaged, the company shall be liable for only such proportion of the loss or damage as the amount insured bears to the whole amount insured thereon, whether such other insurance contains a similar clause or not. It is also provided that the insured shall have the privilege of making other insurance, without notice until required, and that the insurance may be terminated at any time by either party.

It is not claimed by counsel that the policy contains any provision that in express terms required the insured to maintain insurance in the sum of \$90,000, but that such agreement is implied from the statement of amounts set opposite the several classes of property in the schedule, which aggregate the sum of \$90,000, and the fact that it is alleged in the answer that he did insure the property for the sum of \$90,000.

We are unable to find anything in the policy that will warrant us in putting this construction upon the contract entered into by the parties. The provision permitting the insured "to make other insurance, without notice until required," and the clause which provides that the amount of the loss to be paid by the appellant shall be shared *pro rata* with all other insurance existing at the time of the loss, are inconsistent with the position maintained by counsel that the insurance was to be maintained at a precise sum.

The claim is also made that the clause contained in the strip attached to the policy limits the liability to the one-sixtieth of the loss. Had one company taken the whole

Indiana Insurance Company v. Hoffman.

risk it could not well be contended that it would have become liable for the whole loss in any event, but only to the extent of the sums named. So, a company covering one-sixtieth of the above sums, does not agree to pay one-sixtieth of the loss, but the loss to the extent of one-sixtieth of the sums named. By the express terms of the policy the company agreed to indemnify the insured to the amount of \$1,500. Nothing in the policy expressly limits the liability of the company to one-sixtieth of the loss. The amounts set opposite each of the twenty-one items, which aggregate \$90,000, were probably intended to represent the value of the property insured, but whether so intended or not, it is evident the insurance was distributed in the proportions indicated by the amount set opposite each item, for the purpose of preventing the policy from being a "blanket" policy, and to limit the liability of the company in case of a loss of a portion only of the property insured.

It is evident that the insured paid premiums to the company on the basis of a \$1,500 liability, to be lessened by an apportionment by reason of such other insurance as existed at the time of loss. Having paid for full protection he is entitled to receive full protection unless something in the policy plainly forbids it, and we find nothing in the policy inconsistent with his right to recover the one-fortieth of the total loss.

In arriving at this conclusion we are supported by the decisions of the courts in *Hoffman v. Minneapolis Mut., etc., Ins. Co.*, 42 Minn. 291, *Illinois Mut. Ins. Co. v. Hoffman*, 132 Ill. 522, *Hoffman v. Manufacturers' Mut., etc., Ins. Co.*, 38 Fed. Rep. 487, in each of which cases the actions were by the same plaintiff to recover for this same loss, and upon policies substantially like the one under consideration.

Judgment affirmed.

Filed May 14, 1891.

Anderson et al. v. Anderson et al.

No. 14,920.

ANDERSON ET AL. v. ANDERSON ET AL.

NEW TRIAL.—As of Right.—Motion for.—When May be Made.—Motion in Arrest of Judgment.—A motion for a new trial as a matter of right may be made after a motion in arrest of judgment has been filed. The rule that a motion for a new trial comes too late after a motion in arrest of judgment, only applies to motions for a new trial for cause, where the party has knowledge of the fact on which he grounds his motion for a new trial at the time of moving in arrest of judgment.

SAME.—Section 1064, R. S. 1881, Construed.—The provisions of section 1064, R. S. 1881, relative to new trials as a matter of right, are mandatory, and the court has no discretion, but must grant a new trial upon compliance with the requirements of the section, at any time within one year after the rendition of the judgment.

SAME.—Complaint.—When Authorizes New Trial as Matter of Right.—Joinder of Partition Count.—Effect of.—Under a complaint by heirs of a grantor, the first paragraph of which seeks to have a deed set aside because of alleged fraud and undue influence exercised by the grantee over the grantor, and the second and third paragraphs of which are to quiet title to the same land, and for partition thereof respectively, a new trial may be claimed as of right by either party. The joinder of the count for partition does not deprive them of that right.

INSTRUCTIONS TO JURY.—Judged as Entireties.—Obvious Mistake.—Instruction not Vitiating.—Instructions are not to be judged by detached clauses or sentences, but as entireties. Where a mistake in an instruction is so obvious that a jury could not have been misled thereby, there is no available error.

From the Clinton Circuit Court.

J. Kent and J. Claybaugh, for appellants.

S. H. Doyal, P. W. Gard, J. C. Suit, W. R. Moore and J. G. Adams, for appellees.

MCBRIDE, J.—The complaint in this case was in three paragraphs. By the first paragraph it was sought to have a deed for land set aside because of alleged fraud and undue influence exercised by the grantee over the grantor, plaintiffs alleging that they were the owners of the land as heirs at law of the grantor who was deceased.

The second paragraph was to quiet title to the same land,

128	254
140	306
128	254
148	576
128	254
155	426
128	254
162	534

Anderson et al. v. Anderson et al.

and the third was for partition of said land. The appellants were the plaintiffs below. The appellee, David Anderson, was the only party who made a defence, the other defendants having filed disclaimers.

The appellee answered by a general denial, and also filed a cross-complaint alleging title in himself to the land, and asking to have his title quieted. The cross-complaint was answered by a general denial. The cause was tried by a jury and the appellants were successful, the jury returning a general verdict in their favor. The appellee filed a motion for a new trial for cause, which was overruled. He then moved in arrest of judgment, but before the motion in arrest was decided he filed a motion for a new trial as of right, under section 1064, R. S. 1881, tendering with it a bond as required by the statute. This motion the court sustained, and granted a new trial.

Appellants then moved the court to set aside and vacate the order granting a new trial as of right, and to restore upon the records the judgment rendered and entered in favor of appellants. The court overruled this motion with other motions by which appellants sought to obtain the same end, and the question was saved by a proper bill of exceptions.

The cause was again tried by a jury and on this trial the appellee was successful, the jury returning a general verdict finding for him, both on the complaint and cross-complaint. A motion by appellants for a new trial for cause was overruled and judgment was rendered in favor of appellee.

Three propositions are argued by counsel for the appellants:

1st. That the court erred in granting a new trial to the appellee after he had moved in arrest of judgment.

2d. That the appellee was not entitled to a new trial as of right.

3d. The court erred in giving certain instructions to the jury.

It is well settled in this State that a motion for a new trial

Anderson et al. v. Anderson et al.

for cause comes too late after a motion in arrest of judgment. By moving in arrest of judgment a motion for a new trial is waived. 1 Works Practice, section 933, and cases there cited.

This, however, is only true of a motion for a new trial for cause. The reason for the rule, as stated by Chitty in his General Practice, vol. 4, p. 72, is, that by moving to arrest the judgment the party affirms the verdict. The rule as applied to motions for a new trial for cause, is also subject to the exception, that it only applies to cases where the party has knowledge of the fact on which he grounds his motion for a new trial at the time of moving in arrest of judgment. *Mason v. Palmerton*, 2 Ind. 117.

The reason for the rule does not exist, and it can have no application when the new trial is asked for as of right under section 1064, *supra*.

The provisions of that section are mandatory, and the court has no discretion, but must grant a new trial upon compliance with the requirements of the section, at any time within one year after the rendition of the judgment. *Stafford v. Cronkhite*, 114 Ind. 220; *Indiana, etc., R. W. Co. v. McBroom*, 103 Ind. 310.

In our opinion moving in arrest of judgment does not affect the right of a party to thereafter move for a new trial as of right.

Was the appellee entitled to a new trial as of right? In the case of *Butler University v. Conard*, 94 Ind. 353, in which the plaintiff joined in the same complaint an action to recover possession of land and an action to foreclose a mortgage, it was held that the causes of action being improperly joined, and the party having no right to a new trial to foreclose the mortgage, a new trial as of right ought not to be granted. This case was followed in *Miller v. Evansville Nat'l Bank*, 99 Ind. 272. It is held, however, in the same case, citing the case of *Cooter v. Baston*, 89 Ind. 185, that while in an action for partition alone a new trial as of right was

Anderson *et al.* v. Anderson *et al.*

not permissible, yet as under the 5th clause of section 278, R. S. 1881, an action for partition might be joined with an action to recover possession of real property, when the two causes of action were joined, a party to the suit was entitled to a new trial as of right. In the case at bar, as we have said, the second paragraph of the complaint is to quiet title, while the third is for partition. The first paragraph, while in form an action to set aside a deed as fraudulent, is in legal effect an action to recover the land, it being averred, as above stated, that the deed was obtained by the grantee by fraud, and by undue influence over the grantor, who it is averred was the father of the appellants, and they his children and heirs. A suit by creditors to set aside a conveyance as fraudulent, and to subject the land to the payment of a debt, is not a case where a new trial as of right is allowed by the statute. *Truitt v. Truitt*, 37 Ind. 514; *Shular v. Shular*, 56 Ind. 30.

But where, as in this case, the parties attacking the conveyance are not creditors, but heirs of the grantor, who is deceased, who seek by setting the deed aside to recover the land, we think a new trial may be claimed as of right by either party. *Warburton v. Crouch*, 108 Ind. 83; *Adams v. Wilson*, 60 Ind. 560; *Physio-Medical College v. Wilkinson*, 89 Ind. 23.

It follows, therefore, that in this case, under the first and second paragraphs, the parties were entitled to a new trial as of right, while, on the authority of *Cooter v. Baston*, *supra*, the joinder of the count for partition did not deprive them of that right.

We conclude that the court did not err in granting the new trial as of right, or in afterwards refusing to vacate it.

The instructions complained of are not properly in the record, according to the settled practice of this court, and we might disregard the alleged error in giving them. The

Newman et al. v. Kiser.

appellee, however, has not raised the question, and we have examined them.

The instructions in all are twenty-one in number. They are very full, and are, in our judgment, a very fair exposition of the law applicable to the facts of the case. Appellants do not complain of any entire instruction, but find fault with one sentence in instruction number 16, and one word in instruction number 16½. Instruction number 16 strikes us as being, when all read together, quite favorable to appellants, and as containing nothing objectionable. At all events the law is well settled that instructions are not to be judged by detached clauses or sentences, but as entireties. *Craig v. Frazier*, 127 Ind. 286, and cases cited.

The word objected to in instruction number 16½ is the word "influenced." An examination of the context indicates that by a clerical error the prefix "un" has been omitted, and that the word intended was "uninfluenced." The mistake is so obvious that it could not have misled the jury.

We find no error in the record.

Judgment affirmed.

Filed May 14, 1891.

No. 15,837.

NEWMAN ET AL. v. KISER.

APPEAL.—Acceptance of Money Due on Judgment.—Assignment of Errors.—Plea to.—The acceptance of the money awarded by a judgment precludes the prosecution of an appeal. A verified plea to an assignment of errors alleging such an acceptance is a good plea.

SAME.—Assignment of Errors.—Plea in Bar and Abatement to.—Practice.—The practice of answering the assignment of errors by a plea in bar, or in abatement, where there is matter in bar or abatement which occurs after the rendition of the judgment, is generally appropriate and proper,

128	258
143	183
128	258
144	167
144	564
128	258
163	11
128	258
164	250

Newman *et al.* v. Kiser.

for assignments of error may be met by pleas, answers, demurrers or motions.

SAME.—*Attorney's Acts.*—*When Client Bound Thereby.*—*Money Paid on Judgment.*—*Right of Attorney to Receive.*—Where one of the appellants did not directly contract with the attorney who received the money paid in on the judgment, but his co-appellant did, and such attorney was fully recognized by the non-employing appellant as his representative throughout the entire proceedings, it is too late to repudiate the representative's act after action has been taken upon it by the court, or by adverse parties. An attorney has authority to receive money paid to the clerk upon a judgment rendered in favor of his client.

From the Randolph Circuit Court.

E. L. Watson, J. E. Watson, I. P. Gray and P. Gray, for appellants.

A. J. Stokebake, S. J. Peelle and W. L. Taylor, for appellee.

ELLIOTT, J.—The appellee has filed a verified plea to the appellants' assignment of errors and has given notice as required by our rules, although it is probable that the notice is not quite so definite as the rule upon the subject requires, but inasmuch as there is an appearance and no objection to the form of the notice, its lack of certainty is immaterial.

The practice of answering the assignment of errors by a plea in bar or in abatement in cases where there is matter in bar or abatement which occurs after the rendition of the judgment is generally appropriate and proper, for assignments of error may be met by pleas, answers, demurrers or motions. *Brock v. Harris*, 11 How. U. S. 204; *Millar v. Farrar*, 2 Blackf. 219; *Adams v. Beem*, 4 Blackf. 128; *Rundles v. Jones*, 3 Ind. 35; *Veach v. Pierce*, 6 Ind. 48.

The allegations of the plea before us are, in substance, that the appellants were awarded damages in an action wherein the opening of a highway was involved; that the highway had been opened pursuant to the judgment of the court; that, after the entry of the judgment, the appellants' attorney received from the clerk the amount awarded as damages, and that the appeal was not taken until after the

Newman *et al.* v. Kiser.

highway had been opened and after the receipt of the money awarded the appellants by their attorney. The reply of the appellants forms an issue of fact upon the plea.

The evidence is before us in the form of depositions, and it fully supports the allegations of the plea. It is true that one of the appellants did not directly contract with the attorney who received the money paid in on the judgment, but the other appellant, who was the legal owner of the land through which the highway was opened, did expressly employ the attorney. The appellant who did not expressly contract with the attorney fully recognized and treated the attorney as his representative throughout the entire proceedings—he had, indeed, no other, until after the receipt of the money—and he can not repudiate his authority. There can be no question as to the fact that the attorney who received the money was the representative of both the appellants. It is too late to repudiate the representative's act after action has been taken upon it by the court or adverse parties. *Booth v. Cottingham*, 126 Ind. 431.

The question as to the authority of an attorney to receive money paid to the clerk upon a judgment rendered in favor of his client is settled against the appellants by statute, section 968, R. S. 1881, and by the adjudged cases. *Holliday v. Thomas*, 90 Ind. 398; *Yoakum v. Tilden*, 3 W. Va. 167 (100 Am. Dec. 738); *Brackett v. Norton*, 4 Conn. 517 (10 Am. Dec. 179).

The acceptance of the money awarded by the judgment precludes the prosecution of an appeal. *Clark v. Wright*, 67 Ind. 224; *Test v. Larsh*, 76 Ind. 452, and cases cited; *Baltimore, etc., R. R. Co. v. Johnson*, 84 Ind. 420; *Monnett v. Hemphill*, 110 Ind. 299; *State, ex rel., v. Kamp*, 111 Ind. 56; *Sterne v. Vert*, 111 Ind. 408; *McCracken v. Cabel*, 120 Ind. 266; *Smith v. Coleman*, 77 Wis. 343.

Appeal dismissed.

Filed March 20, 1891; petition for a rehearing overruled May 13, 1891.

Barrett et al. v. Sear.

No. 14,968.

BARRETT ET AL. v. SEAR.

TRUST.—Conveyance of Land in Violation of.—Purchaser's Knowledge.—Action to Quiet Title.—Evidence.—B., who was insane, conveyed a piece of land, which was encumbered, to his son for the purpose of borrowing money to pay off the mortgage. The son was to hold the title in the land as trustee for B. and wife. The son permitted the mortgage to be foreclosed, and had a firm of real estate agents buy the sheriff's deed, and execute a quitclaim deed to him, he giving them a mortgage on the land to secure their indebtedness. The son thereafter conveyed the land to S. who was informed and knew before he purchased or took the conveyance of the land, that his grantor only held the land as trustee for B. and wife, and that he had paid no consideration therefor.

Held, that in an action by S. against B. and wife to quiet his title to said real estate, it was competent for B. to show that he was insane at the time he executed a deed for the land to his son, that the son paid no consideration therefor, and that S. purchased the land with full knowledge of all the facts.

Held, also, that S. acquired no better title to the land than his grantor possessed.

From the Fulton Circuit Court.

M. R. Smith, M. L. Essick, O. Montgomery, G. W. Holman and R. C. Stephenson, for appellants.

J. Rowley and M. A. Baker, for appellee.

OLDS, C. J.—This action was brought by the appellee, William Sear, against the appellants, Alexander and Malona Barrett, who are husband and wife, to quiet appellee's title to the land described in the complaint, being about 185 acres situate in Fulton county, Indiana.

The appellants filed an answer, in which it is alleged that, on and prior to the 14th day of March, 1883, the appellant Alexander Barrett was the owner of the land in controversy, of the value of \$8,000; that there was a mortgage on the land, executed by the appellants before that date to one Charles W. Welch, for \$2,200, upon which the interest was due and the principal about to become due, and it was neces-

Barrett et al. v. Seay.

sary to renew the loan or borrow money from some other source to pay off the mortgage ; that before the 14th day of March, 1883, said Alexander had become insane, and has ever since been insane, and on account of his insanity persons having money to loan refused to loan it to him ; that it was agreed between appellants and their son-in-law, Michael C. Brown, that the said Alexander Barrett and his wife Malona should convey the said land to said Brown in trust for them, the said Brown to borrow money to pay off said mortgage of \$2,200, and to mortgage the land to secure the same ; that Brown failed to procure a loan of money in pursuance of their said agreement, and by a further agreement the land was conveyed by Brown to John J. Barrett, a son of the appellants, who was to hold the title in the land as trustee for the appellants, and to secure a loan of a sufficient amount of money to pay said mortgage debt due to Welch. In the meantime Welch had foreclosed his mortgage, and had the land sold at sheriff's sale, and on his foreclosure became the purchaser, and took a certificate of purchase for the same ; that John J. Barrett, in pursuance of the agreement by which he had obtained title to the land, contracted with the firm of Gilmore & Snyder, loan agents, to furnish money and to purchase and take an assignment of the certificate of purchase from Welch, and take a sheriff's deed for the land, and convey the same to said John J. Barrett by quitclaim deed, and said John J. Barrett was to execute to said Gilmore & Snyder a mortgage on the land for the amount of the principal, interest and attorneys' fees, and for the value of their services, which was to be \$100, all of which was done in pursuance of the contract under which John J. Barrett took the land, and he executed his mortgage on the land to said Gilmore & Snyder for the sum of \$2,800, which is yet unpaid and a lien on said land ; that afterwards, on the 23d day of August, 1886, John J. Barrett, in violation of his trust and without authority, conveyed said lands to the appellee in exchange for a title bond to some lands in

Barrett et al. v. Sear.

the State of Missouri, which are of no value, and for which he has never received a deed, and which appellee still has and refuses to convey to him; that the appellants always lived upon and remained in possession of said lands; that appellee lives within thirteen miles of said land, was upon the farm before he pretended to purchase the same, and knew that Alexander Barrett was of unsound mind, talked with the wife Malona, and was informed and knew before he purchased or took the conveyance that the said John J. Barrett only held the land as trustee for appellants, and that it was only conveyed to him for the purpose of his making a loan with which to pay the original mortgage; that he had paid no consideration for the same.

The appellee demurred to the paragraph of answer, setting up the foregoing facts, which demurrer was overruled, and he filed a reply in denial.

Appellants also filed an answer in denial.

The question presented by the record and discussed by counsel arises on the overruling of appellants' motion for a new trial, and relates to the introduction of evidence.

It was admitted by the parties that the appellant, Alexander Barrett, owned the land. Appellee then made proof of the execution of the mortgage by the appellants to Welch, the foreclosure of the same and sale, showing a sale to Welch, the issuing of a sheriff's certificate to him and its assignment to Gilmore & Snyder and a sheriff's deed to them, their deed to John J. Barrett and his deed to appellee. The appellants then offered to make proof of the agreements by which the land was conveyed by appellants to Brown, and from Brown to John J. Barrett; that there was no consideration for such conveyances or either of them; that the purchase of the certificate by Gilmore & Snyder and the taking of the deed by them, and their conveyance to John J. Barrett and the taking back of the mortgage, were all done in pursuance of an agreement made in advance between them and said John J., and that it was in fact but a loan to

Barrett et al. v. Sear.

John J. in pursuance of the agreement under which he had taken title to the land; that the land having been sold the mode of taking a deed and reconveying by quitclaim deed was resorted to instead of a redemption, and to prove the insanity of the said Alexander at the time of the execution of the deed to Brown; that appellants at all times retained possession, and that this information as to all the facts was imparted to the appellee before he contracted for or received a conveyance for the land. This proof was offered to be made by offering the deeds in evidence, and to make proof of the other facts by competent witnesses. Objections were made and sustained, and exceptions were reserved. No question is made as to the form of making or offering to make the proof. The sole question presented is as to the competency of evidence of this character.

It is contended by counsel for the appellee that as the appellee established a title through the sale on the foreclosure of the mortgage and mesne conveyances, the facts alleged did not constitute a defence and could not be proven.

The facts alleged constituted a good defence to the action. At the time of the conveyance by the appellants to Brown, the son-in-law, Alexander Barrett was of unsound mind, which fact was known to the grantee Brown, and there was no consideration for the conveyance, and Alexander retained possession of the land. Brown could not have maintained an action against the appellants to quiet title or for the possession. John J. Barrett, with the knowledge of the facts, received a conveyance for the land and paid no consideration for the same. Both Brown and John J. Barrett took a conveyance of the land for the purpose of mortgaging it to secure a loan to pay off an encumbrance. While they held the naked legal title the deed from Alexander Barrett and his wife was voidable, and Alexander was the equitable owner of the land.

John J. Barrett, in pursuance of his parol contract, made an agreement for the loan of money to pay off the

Barrett *et al.* v. Sear.

debt. Instead of taking the money borrowed and paying off the mortgage debt, and redeeming the land, he contracted with the lenders to purchase the certificate of purchase and take a deed and convey the land to him by quitclaim deed. This they did, and he mortgaged the land to them to secure the amount paid out by them, and their fees and commission in addition.

The land to which the contracts related was the land of Alexander Barrett. By the failure of John J. to borrow the money and pay off the mortgage debt, as he had contracted to do, and allowing the land to sell and the deed to issue to another, who by agreement was to and did reconvey it to him upon his mortgaging the land for the amount of the debt, he acquired no better title to the land than he had by virtue of his original conveyance. John J. Barrett has paid nothing for the land, but simply pledged the land, which in equity belonged to Alexander, for the repayment of the debt. The appellee purchased the land with full knowledge of all the facts, and the appellant Alexander is not estopped from avoiding the voidable deed which he executed to his son-in-law Brown for the land. Procuring a deed to issue on the sheriff's certificate to Gilmore & Snyder, and having them convey the land to him, John J. Barrett, with a view of obtaining a valid title to the same as against the appellants, was a fraud upon the right of the appellants. The only thing of value given in consideration for such conveyance as appears from the facts was the mortgage upon the land, which was in fact owned by the appellant Alexander, and in which John J. had no interest, and which was worth five thousand dollars more than the mortgage debt. The taking of the deed under the facts as alleged vested the title in John J. in trust for Alexander. The property mortgaged and pledged for the purchase-money was the property, the land, of said Alexander. *Hull v. Louth*, 109 Ind. 315; *Gray v. Turley*, 110 Ind. 254; *Physio-Medical College, etc., v. Wilkinson*, 108 Ind. 314; *Musselman v. Cravens*, 47 Ind. 1; *Rupert v. Morton*, 19 Ind. 313;

Cashman *et al.* v. Brownlee *et al.*

Arnold v. Cord, 16 Ind. 177; *Baker v. Leathers*, 3 Ind. 558; *Cox v. Arnsmann*, 76 Ind. 210.

The evidence offered was competent, and should have been admitted.

The court erred in overruling the motion for a new trial.

Judgment reversed, at costs of appellee, with instructions to grant a new trial.

Filed May 13, 1891.

128	266
133	268
128	266
134	559
128	266
161	651

No. 15,035.

CASHMAN ET AL. v. BROWNLEE ET AL.

128	266
170	395

RAILROADS.—*Consolidation of Companies.*—*Title to Real Estate.*—Where land is conveyed in fee simple to a railroad company, and afterwards the company is consolidated with another, and further consolidations take place from time to time, the new companies formed by the successive consolidations succeed to said real estate.

ESTOPPEL.—*Adverse Possession.*—The heirs of the grantor to the railroad company, and their grantees, are estopped by his deed from setting up an adverse title derived from possession alone, as against his grantee and those claiming under it.

ABATEMENT.—*Plea in.*—*Former Action.*—*Non-Payment of Costs in.*—*Practice.*—It is a matter in the sound discretion of the court, as to whether or not, it will stay proceedings upon the filing of a plea in abatement alleging that the plaintiffs had formerly commenced an action upon the identical supposed cause of action set up in the complaint in the second action, and had dismissed the same, and that the defendants had recovered a judgment in said original action for costs which had not been paid.

From the Grant Circuit Court.

A. E. Steele and *J. A. Kersey*, for appellants.

G. W. Harvey, *W. Paulus* and *H. Brownlee*, for appellees.

COFFEY, J.—This was an action by the appellees against the appellants, instituted in the Grant Circuit Court, to recover possession and to quiet title to certain described real estate.

Cashman *et al.* v. Brownlee *et al.*

The appellants filed a plea in abatement alleging that the appellees had formerly commenced an action upon the identical supposed cause of action set up in the complaint in this cause, which action was dismissed by the appellees; that the appellants recovered a judgment in said action for costs which had not been paid.

To this plea the appellees answered that they had been unable to pay said costs; that they had a meritorious cause of action against the appellants, and that the present action was not vexatious but was prosecuted in good faith.

A trial of the issue thus formed resulted in a finding and judgment against the appellants.

The evidence is not in the record. We can not say the court erred. It is a matter in the sound discretion of the court as to whether or not it will stay proceedings in a case like this. *Kitts v. Willson*, 89 Ind. 95.

The cause was tried by the court, who, at the request of the appellants, found the facts specially and stated its conclusions of law thereon.

The material facts in the case, as found by the court, are that, on the 6th day of February, 1854, Abraham Oppy, then the owner of the land in dispute, conveyed the same by deed, without covenants of warranty, to the Marion and Mississinewa Valley Railroad Company for a right of way for its railroad, in consideration of the sum of five hundred dollars, which deed was duly recorded.

No railroad was ever constructed on the land. On the 8th day of January, 1863, the Marion and Mississinewa Valley Railroad Company was consolidated with the Union and Logansport Railroad Company and took the name of the latter company, it succeeding, by agreement, to all the property of the former company, including the land in controversy, of which it took possession. It subsequently constructed a railroad from Union City, in Randolph county, to the city of Logansport, in Cass county, on the right of way and road-bed of the Marion and Mississinewa Valley

Cashman et al. v. Brownlee et al.

Railroad Company, except at certain points where another and different right of way and road-bed were adopted. The road was constructed three-fourths of a mile distant from the land in controversy.

On the 11th day of June, 1867, the Union and Logansport Railroad Company was consolidated with the Columbus and Indiana Central Railroad Company and the Toledo, Logansport and Burlington Railway Company, and took the name of the Columbus and Indiana Central Railway Company.

On the 4th day of December, 1867, the Columbus and Indiana Central Railway Company was consolidated with the Chicago and Great Eastern Railway Company, and they adopted the name of the Columbus, Chicago and Indiana Central Railway Company. Since the completion of the road in 1867 it has been operated continuously by the above named companies, but at the time of the trial of this cause it was operated by the Chicago, St. Louis and Pittsburgh Railway Company.

On the 30th day of April, 1886, the Columbus, Chicago and Indiana Central Railway Company conveyed the land in dispute to the appellees in this case.

Abraham Oppy departed this life in the year 1869.

In July, 1872, the lands of which Abraham Oppy died seized were partitioned, and the land in dispute, together with other lands, was set off to David Oppy, a son, he at the time having knowledge of the deed of his father above mentioned.

After the death of Abraham Oppy the railroad company granted to David Oppy the privilege of cultivating the land in dispute.

On the 14th day of September, 1876, David Oppy conveyed the land, with other lands, to George Harrison and Roger P. Spiker.

On the 9th day of October, 1877, Harrison and Spiker conveyed to Cyrus Emerick.

Cashman *et al.* v. Brownlee *et al.*

On the 21st day of August, 1879, Emerick conveyed to James Estey; and on the 26th day of November, 1886, Estey conveyed to the appellants.

At the time of his purchase the appellant, William Cashman, had notice that the appellees claimed the land under a deed held by them.

From this brief statement of the facts found by the court, it will be observed that the appellees have a regular chain of title from Abraham Oppy to themselves, provided the consolidated railroad companies above named each succeeded to the rights of the Marion and Mississinewa Valley Railroad Company in the land in dispute; and provided, further, that the deed executed by Oppy conveyed a fee simple interest.

Mr. Rorer, in his work on Railroads, in discussing the question of consolidation, p. 38, vol. 1, says: "And so the Legislature may allow a consolidation of two railroad corporations, by the merger of the one into the other, whereby the one so merged loses its corporate existence. Such merger works with it a dissolution—destroys the actual (or *de facto*), identity of both, but preserves the legal identity of the latter. The company so merged, that is, all its members, pass into and become members of the company into which it is merged. All its corporate privileges and property become vested therein, and all the liabilities of the extinct company become chargeable against the corporation into which it is merged." To the same effect is Beach on the Law of Railways, section 553. See, also, *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 42.

In the case of *Paine v. Lake Erie, etc., R. R. Co.*, 31 Ind. 283, it was held that a railroad company formed by the consolidation of two companies succeeds to all the rights of each of the corporations of which it is composed. Such new company also assumes the liabilities of the old companies. *Indianapolis, etc., R. R. Co. v. Jones*, 29 Ind. 465; *Columbus, etc., R. W. Co. v. Powell*, 40 Ind. 37; *Jeffersonville, etc., R. R. Co. v. Hendricks*, 41 Ind. 48.

Cashman *et al.* v. Brownlee *et al.*

We think that the new companies formed by the consolidations set out in the special finding of facts in this case respectively succeeded to the real estate in controversy. This being so, it follows that the record title of the appellees is perfect.

The deed from Oppy to the Marion and Mississinewa Valley Railroad Company purports to convey the land therein described in fee simple, and in this the case before us is distinguished from the case of *Cincinnati, etc., R. W. Co. v. Geisel*, 119 Ind. 77, where the deed released a mere right of way—an easement only. In this case the deed of Oppy conveyed the fee of the land described in the complaint to the Marion and Mississinewa Valley Railroad Company, and the deed of the Columbus, Chicago and Indiana Central Railway Company vested such fee in the appellees.

On the trial of the cause the appellant, William Cashman, offered to prove by himself and other witnesses that Abraham Oppy, David Oppy and their grantees had continuously occupied the land, and had claimed and held the same openly, notoriously and adversely for more than twenty years immediately preceding the commencement of this suit, but the court sustained an objection to the evidence. This ruling was assigned as a reason for a new trial.

All the parties to this suit claim title through Abraham Oppy. It is not claimed by the appellants that they have title to the land derived from any source other than by regular conveyances from David Oppy, the son of Abraham, and the possession taken and held pursuant to such conveyances. The possession of a grantor is not adverse to the title of his grantee. Abraham Oppy, by his deed to the Marion and Mississinewa Valley Railroad Company, estopped himself from claiming title to the land in dispute adverse to that company, and his heirs and their grantees are likewise estopped by the same deed. *Fite v. Doe*, 1 Blackf. 127;

Davis et al. v. Fasig.

Rowe v. Lewis, 30 Ind. 163; *Record v. Ketcham*, 76 Ind. 482; *Ronan v. Meyer*, 84 Ind. 390.

The appellants, claiming title as they do through the heirs of Abraham Oppy, are estopped by his deed from setting up an adverse title derived from possession alone as against his grantee and those claiming under it, and for this reason the court did not err in sustaining an objection to this offered testimony.

Some other questions, not of controlling influence, are presented and argued by the appellants, but after giving them a careful consideration we are of the opinion that the court did not err in the matters of which complaint is made.

We find no error in the record for which the judgment of the circuit court should be reversed.

Judgment affirmed.

Filed May 13, 1891.

No. 16,019.

DAVIS ET AL. v. FASIG.

INJUNCTION.—*Application to Dissolve Pending Appeal.*—A motion to dissolve an injunction, made unsuccessfully in the lower court while an appeal from the order granting it is pending in the Supreme Court, is not sufficient to authorize the dismissal of the appeal when it is not made to appear, that the appellant has taken a position in the lower court inconsistent with the one he occupies in the Supreme Court, or that the position of the parties to the appeal has been in any manner changed or altered.

SAME.—*Interlocutory Judgment.*—*What is not.*—In an action to restrain the enforcement of a city ordinance, a submission of the case upon the complaint, a finding that the injunction should be granted and the granting of the injunction as prayed, and an order that it be continued "until the validity of the ordinance in question shall have been finally determined" in the Supreme Court, is not an interlocutory, but a final judgment.

MUNICIPAL CORPORATIONS.—*Injunction.*—*Validity of an Ordinance.*—A

128	271
132	567
128	271
145	466
128	271
161	257
161	571
128	271
168	529
128	271
169	381

Davis *et al.* v. Fasig.

court of equity may enjoin the enforcement of a void city ordinance in order to prevent a multiplicity of actions, or at the instance of any person whose interests are to be injuriously affected thereby; but if it is not void, a court of equity can not determine whether or not the plaintiff is guilty of its violation.

SAME.—*When Entire Ordinance Must be Void.*—Unless the party asking an injunction points out some particular provision in the ordinance that infringes upon his rights or privileges, in order to justify a court in declaring the ordinance void, the ordinance must be void *in toto*.

SAME.—*Saloon Closing Ordinance.*—*Validity.*—An ordinance requiring all keepers of saloons, and of other like place, to eject every person not regularly employed therein at the hour of 11 P. M., to close and lock the doors securely, and permit no ingress thereto between that hour and 5 A. M.; requiring all persons not employed to depart between such hours, when requested; making it unlawful to open the door, or leave it unlocked, or to permit ingress thereto between such hours, and extending the same rules and regulations to Sundays, legal holidays and election days, is valid.

From the Vigo Circuit Court.

R. B. Stimson and *C. R. Stimson*, for appellants.

G. W. Faris and *S. R. Hamill*, for appellee.

MILLER, J.—This was an action brought by the appellee against the mayor, marshal, chief of police and city attorney of the city of Terre Haute, to enjoin them from hearing, determining or prosecuting any action to recover penalties under an ordinance of the city requiring saloons to be closed from eleven o'clock P. M. till five o'clock A. M., and on Sundays, election days and holidays.

The complaint was filed on the 13th day of December, 1890, during term time of court. Upon a showing that an emergency existed, a temporary restraining order was issued, restraining the mayor and other officers from hearing or prosecuting actions for the enforcement of the ordinance until the 3d day of January, 1891, at which time the cause was set for hearing. Notice having been served on the appellants, they appeared at the time fixed for a hearing, and upon their motion the restraining order was so modified as to permit the prosecution of one suit, then pending in the

Davis *et al.* v. Fasig.

circuit court against James Madigan, and leave was given the plaintiff to amend his complaint.

On the 28th day of January, the cause was heard, and upon the hearing an injunction was granted enjoining the hearing or prosecuting of actions for the enforcement of the ordinance, until the validity of the same should be finally determined.

This appeal is prosecuted from the final judgment of the court granting this injunction.

It appears from a return to a *certiorari* that since the cause has been pending in this court, an unsuccessful application was made by the appellants, in the court below, to dissolve the injunction appealed from, and we are asked on that account to dismiss this appeal. No authority is cited in support of the motion, and as it does not appear that the appellants have taken a position inconsistent with the one they occupy in this court, or that the position of the parties to this appeal has been, in any manner, changed or altered, the motion can not be sustained on that ground.

The appellee also asks that the appeal be dismissed, for the reason that the order of the court from which the appeal was taken was an interlocutory order, from which no appeal will lie.

As the judgment of the court, from which the appeal was taken, stood on the record when the cause was filed in this court, it might well be questioned whether it was appealable after the close of the term; but the judgment as amended by order of the court, and brought here by a *certiorari* is a final judgment.

The record, as amended, shows that the cause was "submitted to the court upon the facts alleged in the plaintiff's amended complaint; and the court being fully advised in the premises, finds for the plaintiff, and finds that the injunction as prayed for in plaintiff's amended complaint should be granted. It is therefore ordered and adjudged that the in-

Davis *et al.* v. Fasig.

junction as prayed for in plaintiff's amended complaint be granted and continued until the validity of the ordinance in question shall have been finally determined."

This was not an interlocutory order staying proceedings in a cause for a time, as was the case in *Taylor v. Board, etc.*, 120 Ind. 121, but was a final termination of the suit.

The amended complaint alleges that the petitioner is a resident, citizen and taxpayer of the city, engaged in keeping a saloon for the sale of intoxicating liquors, to be drank on the premises; that he brings this action and files the petition on behalf of himself and one hundred and seventy other persons similarly situated. It also alleges that the defendants have commenced prosecutions against the plaintiff and others for alleged violation of the ordinance, which is incorporated in the complaint, and will, unless restrained by the court, commence other prosecutions for the enforcement of the ordinance.

The objections to the ordinance are stated as follows:

"And your petitioner also shows that said ordinance is unconstitutional, illegal and absolutely void, it being unreasonable in its provisions, uncertain in its terms, in restraint of trade, prohibitory, and the same is in conflict with and contrary to the provision of section 21 of article 1 of the Constitution of the State of Indiana."

It is averred that before the commencement of this suit a prosecution had been instituted before the mayor of the city against one James Madigan, for a violation of the ordinance, which action had been appealed, and was pending in the circuit court; that the question of the validity of the ordinance could be determined in that action.

The complaint shows the apprehension and distress of the plaintiff at the prospect of the failure of the threatened prosecutions, and the consequent increased liability of the city for costs, which he says would be irreparable.

The prayer asks for a temporary restraining order, and that a writ of prohibition issue commanding the defendants to

Davis et al. v. Fasig.

abstain from filing any complaints for the recovery of the penalties provided for by said ordinance, or from prosecuting any of the actions pending, except the one against Madigan, until the validity of the ordinance should be determined in that action.

The city ordinance is as follows :

"An ordinance regulating the closing of saloons.

"Section 1. Be it ordained by the common council of the city of Terre Haute, that at the hour of 11 o'clock P. M. it shall be the duty of every person who is keeping or assisting to keep any shop, saloon or other place within said city, or within two miles of the corporate limits thereof for the purpose of selling, bartering or giving away any kind of intoxicating liquors, to be used on the premises, to eject therefrom every person not regularly employed therein; to close and lock the doors thereof securely, and permit no ingress thereto between said hour and the hour of 5 o'clock A. M., and it shall be the duty of every person found in any such place between said hours to depart therefrom when requested to do so. Any person violating any provision of this section, shall be fined not less than five dollars nor more than twenty-five dollars.

"Section 2. It shall be unlawful for any person who is keeping, or assisting to keep, any shop, saloon or other place within said city, or within two miles thereof, for the purpose of selling, bartering or giving away any kind of intoxicating liquor to be used on the premises, to open such shop, saloon or other place, or have any door thereof unlocked on Sunday or on any election day or legal holiday, or to permit ingress thereto of any person not regularly employed therein. Any person violating any provision of this section shall be fined not less than ten dollars nor more than fifty dollars for each offence.

"Section 3. It shall be the duty of any member of the police force of the city of Terre Haute, within whose view or knowledge any provision of this ordinance may be violated,

Davis *et al.* v. Fasig.

to take the necessary steps to secure the arrest and conviction of the offender, and any policeman who shall wilfully refuse to do so shall be removed from the force.

"Section 4. Whereas, An emergency exists for the immediate passage of this ordinance, all rules to the contrary are suspended and this ordinance shall be in force on and after its adoption and publication.

"Adopted November 18th, 1890."

Counsel for the appellee admit, in their brief, that they are not entitled to a writ of prohibition against the mayor, and say that the prayer in the complaint for such relief was improperly and inadvertently inserted. This admission renders it unnecessary for us to examine and pass upon that branch of the case.

We can not agree with counsel that a court of equity may not in a proper case enjoin the enforcement of city ordinances to prevent a multiplicity of actions. It has been held that where an ordinance is void, any party whose interests are to be injuriously affected thereby may go into a court of equity and have its enforcement stayed by injunction. *Mayor, etc., v. Radecke*, 49 Md. 217. But where the ordinance is not void, a court of equity can not determine whether or not the plaintiff is guilty of its violation. *Davis v. American Society, etc.*, 75 N. Y. 362; *Village of Des Plaines v. Poyer*, 123 Ill. 348.

It is essential, in a case like this one, where the plaintiff does not point out any particular provision in the ordinance that infringes upon his rights or privileges, in order to justify a court in declaring an ordinance void, that it should be void, not simply in some of its provision, but void *in toto*, *Dillon Munic. Corp.*, section 421. Some provisions of an ordinance might be void, and others valid and enforceable, and unless the plaintiff is so placed as to be injured by the void part he is in no condition to question the validity of the ordinance.

This renders it necessary for us to examine and pass upon

Davis *et al.* v. Fasig.

the validity of the ordinance in question, not upon each provision of the same, but taking it as a whole.

In the late case of *Decker v. Sargeant*, 125 Ind. 404, an ordinance of the city of Valparaiso was upheld, which provided that places where intoxicating, distilled or fermented liquors are sold to be drank on the premises, should be closed at 11 o'clock P. M. of each day, at which time all door-screens and obstructions should be removed, so as to give an unobstructed view of the interior, and also required visitors to be excluded from the premises during the time they were to be kept closed.

The ordinance in question is, in principle, very similar to the one referred to in *Decker v. Sargeant*, *supra*, and upon the authority of that case we hold that the ordinance in question is not subject to any of the objections charged in the complaint, and that, therefore, the court erred in enjoining the prosecution of actions to enforce obedience to its requirements.

The appellants have assigned as error the action of the court in granting the restraining order issued at the time the complaint was filed without notice to the adverse party.

We can not review the action of the court in this appeal for several distinct reasons.

One is, that the original complaint, filed at the inception of the cause, is not in the record, and we can not therefore know what kind of a showing the plaintiff made, or what excuse he had for not giving notice.

In *Vance v. Workman*, 8 Blackf. 306, this court says that a bill filed to enjoin a sheriff's sale of real estate, filed on the day the sale was to take place, does not show an emergency, no reason being given why the suit was not filed sooner.

In *Indiana Central R. W. Co. v. State, etc.*, 3 Ind. 421, in passing upon this question, the court says: "The principle here asserted is, that the complaining party must not only show that an immediate injury is about to be inflicted, but also that he could not reasonably have anticipated it in time to

Dickey *et al.* v. Shirk.

give the requisite notice. Otherwise the complainant might always make a case of emergency, by waiting until the act he desires to have restrained is upon the point of being done."

We can not accept the argument made by the appellants, that because court was in session in the city of Terre Haute we should infer that notice might, by the use of due diligence, have been served upon the mayor, marshal, chief of police or city attorney of the application for an injunction. The argument seems plausible, but we must presume in favor of the action of the court.

The judgment of the court is reversed, with costs, and the court is directed to dissolve the injunction and to sustain the demurrer to the complaint, and for further proceeding in accordance with this opinion.

Filed May 19, 1891.

No. 14,969.

DICKEY ET AL. v. SHIRK.

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159 658
128 278
160 448

INTERROGATORIES.--*Antagonistic Interrogatories.*--If two interrogatories, and the answers thereto, are antagonistic, and in opposition to each other, they neutralize and destroy each other, and must be disregarded.

INSTRUCTION.--*Interrogatories Showing Erroneous Instructions Harmless.*--If it appear affirmatively from an interrogatory, and the answer thereto, that the complaining party was not harmed by an erroneous instruction given, or by the refusal of a proper one, the error is immaterial.

EVIDENCE.--*Claim of Ownership.*--*Conversation.*--An interrogatory addressed to a witness requiring him to call to mind a conversation he has had with a certain person, and to state if it amounted to asserting a claim of ownership of the property in question, can be excluded by the court.

REAL ESTATE.--*Partnership, Treated as Personalty.*--Real estate owned by a partnership is treated as personal property, although the title is taken in the name of one of the partners.

SAME.--*Wife's Interest in Partnership Realty.*--The wife of one of the partners of a partnership has no interest in the real estate owned by the

Dickey *et al.* v. Shirk.

partnership which is sold and conveyed, even without her joining in the deed of conveyance, during the partnership.

From the Tipton Circuit Court.

W. R. Oglebay, John H. Swoveland, Milton Bell and W. C. Purdum, for appellants.

J. N. Waugh J. P. Kemp, R. B. Beauchamp, W. W. Mount, G. H. Gifford and J. M. Fippen, for appellee.

OLDS, C. J.—From 1863 to 1871, the appellant, Hugh Dickey, and one James V. Cox, were in partnership doing a speculative business, purchasing real estate, buying tax-titles, etc. During their said partnership certain real estate was purchased, one tract of Isaac Parker, and one tract of Lorinda E. Jackson, and paid for by Dickey with his own money, and deeds taken for the same in his own name. In the year 1871, Cox died, the partnership being unsettled at the time of his death. Prior to the death of Cox, he took exclusive possession of the real estate. After his death the land was treated as part of his estate, and conveyed by his widow and children, and the appellee, Elbert H. Shirk, Jr., became the owner of the real estate in controversy, in this action, and described in the complaint, through mesne conveyances from the widow and children of Cox, being part of the tracts purchased of said Parker and Jackson, and this suit is brought by the appellee against said appellants, Hugh Dickey and Hannah Dickey, his wife, to quiet his title to the same.

Issues were joined and a trial had, resulting in a verdict and judgment for the appellee. The jury returned a general verdict in favor of the appellee; they also returned answers to certain interrogatories propounded by both the appellants and appellee. Appellants severally moved the court for judgment in their favor on the answers to interrogatories, notwithstanding the general verdict, which motions were overruled and the ruling assigned as error. Appellants also moved for a *venire de novo*, which was overruled; also, for a

Dickey et al. v. Shirk.

new trial, which was overruled, and these several rulings are assigned as error.

The theory of the appellee is, that the real estate was purchased by the firm of Dickey & Cox as partnership property; that Dickey advanced the purchase-money and took the title in his own name, but that it was in fact purchased by the firm, and Dickey advanced and paid the purchase-money for the firm; that afterwards the firm repaid to Dickey the purchase-money so advanced, and that in the adjustment of their partnership affairs, by agreement between them, Cox became the owner of all the real estate in controversy, and accounted to and paid Dickey for the same and took exclusive possession of it, and he and his heirs and their grantees have ever since continuously held possession, occupied and improved the same; that the appellee is the equitable owner of the portion in controversy in this suit. On the other hand, it is contended by the appellants that the purchase by said Dickey was an individual purchase by him and the purchase-money paid by him, whereby his wife took an interest which could not be divested by any sale made by her husband, and that it could only be divested by a deed in which she joined with her husband.

It is also maintained that even if it was purchased as partnership property, and paid for by Dickey, that by the agreement it was only to become partnership property on its being paid for by the firm, and until it was paid for by the firm and conveyed to the firm by Dickey, in which conveyance his wife joined, she would not be deprived of her interest. It is further contended that Dickey has never been repaid any portion of the purchase-money, and it is maintained:

First. That appellant Hugh Dickey is the owner in fee of all the real estate.

Second. That there vested in his wife Hannah an inchoate interest in one-third, which has in no event been divested.

Third. That the cause of action is in favor of the appellee.

to quiet title, if any accrued, is barred by the fifteen years' limitation.

The principal discussion of counsel is addressed to the ruling of the court in overruling the motion for judgment on the interrogatories notwithstanding the general verdict.

It is contended by counsel for the appellant that the answers to interrogatories are in direct conflict with the general verdict.

We do not think there was error in this ruling of the court. Some of the answers, considered separate and apart from the others, may be said to be antagonistic and in conflict with the general verdict, but they are in conflict with other interrogatories and answers which support the general verdict. Where two interrogatories and answers are antagonistic and in opposition to each other, they have the effect to neutralize and destroy each other, and they must be disregarded in so far as having any effect to overthrow a general verdict. In this case the interrogatories and answers are so in conflict with each other, and so unintelligible, that they can not be allowed to control the general verdict.

The difficulty, in part at least, comes from not stating each question separately in succinct and definite language, so as to be easily and clearly comprehended and fully understood by the jury.

The jury find that Dickey and Cox entered into a general partnership in 1863, which continued until the death of Cox, in 1871; that during the partnership the real estate in controversy was purchased for the partnership, and became the property of the partnership, and that the members of the firm were equal owners; that the widow and children of Cox inherited all the interest in the real estate that Cox owned. They find that Parker and Jackson each owned a separate part of the real estate, and conveyed it to Dickey, and that he paid for the same of his own means; that the appellant, Hannah Dickey, at the time of the purchase, was, and ever since has been, the wife of the appellant Hugh Dickey.

Dickey et al. v. Shirk.

The interrogatories which it is most earnestly contended are in conflict with the general verdict are, first, No. 4, propounded by appellee, as follows:

"4. Was not the real estate in dispute, from the time of its purchase, held as the property of said partnership until about the year 1869, at which time was not the said real estate sold to the said James V. Cox, and in pursuance of the sale did not the said James V. Cox take the exclusive possession of the said real estate, and did he not continue such ownership and possession until the date of his death, in the latter part of the year 1871?" The answer is, "We do not so find."

There are several propositions stated in the question. All that can be said the jury intended by the language used in the answer is that they do not find that the facts are as stated in the question; in other words, the jury do not find that the facts as stated are true, nor do they find that each fact stated is not true; that is to say, the answer can not be construed as a finding by the jury that the real estate was not held at all as partnership property, for they have answered to interrogatory No. 2 directly that it was purchased as partnership property, and that it became partnership property. Nor can it be construed to be a finding that it was not sold to Cox at all, or that he did not take possession, and hold it for a time. It may be said to be a finding inferentially that he did not purchase it at a particular time, and hold it for the time stated, but this is as unfavorable a construction to the appellee as can be given to the answer. Either party was entitled to a definite answer to the question, and they waived their right to have a definite answer.

Question 9, propounded by the appellant, is as follows:

"9. Did the defendant Hugh Dickey ever sell said lot No. 18 to James V. Cox or to any other person?" The answer is, "No proof that he did."

"Question 10. If the jury should answer the next preceding question in the affirmative, then when was said sale

Dickey et al. v. Shirk.

made and what was the consideration paid?" The answer is, "We, the jury, find no consideration or sale of land."

In their answer to question 11, which asked if Dickey did not purchase and pay for the land with his own money and take the deed in his own name, with the understanding that Cox should pay to him one-half, and after Cox paid the one-half, that it should thereafter be held and considered as partnership property, the jury answered that it was held as partnership property.

By the answer to question 12 the jury find that Cox paid, or accounted either individually or in the course of their partnership, to Dickey for the purchase-money of said real estate.

From the answers to interrogatories it may fairly be said that the jury have found that the property was purchased by the firm and held as partnership property, but that Dickey advanced the purchase-money and took the title in his own name, and that afterwards Cox paid or accounted to said Dickey for the purchase-money. There is no finding controverting the fact that the firm sold the land to Cox. The jury find the property to be the property of the firm; that there was no sale by Dickey to Cox, but that Dickey had been fully paid for the same by Cox. The answers are reconcilable on the theory that the jury regarded the property as firm property, and as being sold by the firm to Cox and that Cox accounted to and paid Dickey for it. They further find that there was a settlement between Dickey and the executor of the will of Cox, and that Dickey was owing the estate some four thousand dollars which he paid, and that in said accounting the real estate was not considered or taken into account.

There is no finding controverting the fact that Cox paid Dickey for the land, took possession of it as his own and improved it, and after his death his wife and children retained possession and sold the same. Nor do the answers

Dickey et al. v. Shirk.

controvert a sale of this partnership real estate to Cox by the firm and the payment by him for the same.

The general verdict finds all the facts entitling the appellee to recover in his favor, and we do not think the answers to interrogatories find facts which overthrow the general verdict and entitle the appellants to judgment. Nor do the answers to interrogatories disclose any facts that show the action to be barred by the statute of limitation of fifteen years. The answer stating that the cause of action accrued more than fifteen years prior to the commencement of the action states a mere conclusion. There are no facts found showing that the appellee, or those through whom he claims title, took possession of the land adversely to the appellants more than fifteen years before the commencement of the suit, or that the appellants asserted their claim of title more than fifteen years before the suit was commenced.

It is contended that the court erred in sustaining an objection to a question propounded to appellant, Dickey, on re-examination.

The land had been platted, and one Wright had become the owner of some lots that were part of the land purchased of Parker W. Jackson, and on cross-examination the witness's attention was called to the fact that Wright had purchased the lots and finding they were in the name of Dickey, called upon Dickey for a deed, and Dickey was cross-examined to show that he was called upon by Wright to make him a deed to perfect his title, and that he had done so for a nominal or no consideration.

The conversation which took place between Wright and the witness, Dickey, was not asked for or sought to be elicited, but it is apparent that the evidence sought to be elicited was the fact that Wright having purchased the lot as the property of the heirs of Cox, and finding that his title was defective, for the purpose of perfecting his title called upon Dickey to make him a deed, which he did for a nominal or no consideration. This fact was sought to be elicited as a

Dickey *et al.* v. Shirk.

circumstance tending to establish appellee's theory of the case. On re-examination the witness was asked the following question :

" Now, you may state whether in this matter of making a quitclaim deed to Mr. Wright, or to his grantee, whether or not you claimed to Mr. Wright to have the title, to own the title to this land ; whether or not you claimed the ownership of this land in this same transaction."

Objection was made to the question and sustained. This question sought to have the witness state what he claimed, or rather to state his conclusion as to whether he made a claim of ownership to the lots or not.

If the cross-examination was of such a nature as to entitle the appellant to have the conversation detailed on re-examination, then the proper method was by asking what was said on the occasion, and to have the witness state what was said in the conversation in relation to the making of the deed to Wright.

The question propounded was not proper. It called upon the witness to give his version as to whether or not he made a claim of title or of ownership. It asked the witness to call to mind what was said, and draw a conclusion as to whether or not it amounted to asserting a claim of ownership, and state that conclusion. This was not proper, and there was no error in sustaining the objection.

This is the only question as to the introduction of evidence which is discussed.

It is contended that the sixth instruction given is erroneous.

This instruction is to the effect that if Dickey and Cox were partners, and in the course of their partnership business one or both members of the firm purchased the real estate in controversy as the property of the firm, but at the request of Cox the title was taken in the name of Dickey for the firm, and afterwards, by the agreement of said partners, Dickey and Cox, the property was sold to Cox, and in pursuance of said agreement and sale, Cox was put into and took exclusive

Dickey et al. v. Shirk.

possession of the same, and so held the same until his death, and the plaintiff (the appellee), at the time of the commencement of this suit, had and held all the right, title and interest, including possession of said real estate that was held by Cox at the date of his death, then he would be entitled to recover, and have his title quieted against both of the defendants.

This instruction properly stated the law. If the real estate was part of the assets of the firm, as found by the jury, then as against the other partner, the wife of Dickey had no interest in it, and if in the course of their business this property was sold to Cox, and he put into full possession and control of it, in equity it became his property, and he or his grantees had the right to have the title quieted.

If Dickey advanced the purchase-money for the firm, and purchased the property for the firm, as contended by the appellee, it became the property of the firm, and the firm thereby became indebted to Dickey for the amount advanced, which he was entitled to have paid to him or taken into account in adjusting the affairs of the partnership. This the jury find was done; that Cox accounted to Dickey for the purchase-money. The real estate of a partnership is treated as personal property; this is true, although the title is taken in the name of one of the partners. Story Equity (13th ed.), p. 682, sec. 674; Lindley Partnership, p. 343.

It is also earnestly contended that the court erred in giving the seventh instruction. This instruction proceeded upon the theory that if the real estate was owned by Dickey individually, and he sold the same to Cox and put Cox in possession and Cox took full possession and control of it, and so retained the possession and control up to the time of his death, and after his death his heirs or grantees retained possession, and the appellee at the time of the commencement of this suit had held and owned, and still has and owns, all the interest owned by Cox at the date of his death, he is entitled to recover and have his title quieted as against

Dickey et al. v. Shirk.

Hugh Dickey, although the purchase-money may never have been paid by Cox, and Dickey and wife may never have conveyed the same to Cox.

The answers of the jury to special interrogatories find that the real estate was purchased for, and became the property of, and was held as the property of the firm. And they further find that Cox accounted to Dickey for the purchase-money. It, therefore, appears affirmatively that the appellants were not harmed by this instruction, although erroneous. The jury found the real estate to belong to the firm, and that Cox accounted to Dickey for the purchase-money. It is, therefore, evident that they did not arrive at the verdict in favor of the appellee on the theory of its being the individual property of Dickey, and were not governed by the instruction relating to this theory of the case. It appearing by the answers to interrogatories that the appellants were not harmed by the instruction, although erroneous, the giving of it is not cause for a reversal of the judgment.

It is next contended that the verdict is not sustained by sufficient evidence, and is contrary to the law applicable to the facts. We have considered the evidence and can not agree with this contention. There is sufficient evidence to sustain the verdict.

Error is also assigned on the ruling of the court in refusing certain instructions requested by the appellant. The first instruction relates to the burden of proof, and is fairly covered by the instructions given, as is also instruction number three which was refused. Instruction number four was an instruction based upon the theory that the land was purchased and paid for by Dickey, and that he and Cox had an agreement that when Cox paid to Dickey one-half of the purchase-money paid by Dickey for the same that Cox was to be an equal partner, and if Cox never paid the one-half of the purchase-money and died, and the partnership was settled and the debts of the firm were all paid, Dickey paying his portion without taking into consideration said land,

Dickey et al. v. Shirk.

in that event the land would not be the partnership property, but the property of Dickey.

The court gave to the jury full and fair instructions as to what was necessary for the appellee to prove to entitle him to recover, and the jury find that the land was purchased as partnership property and held by the firm as such, and it is evident that the appellant was not harmed by the refusal to give this instruction. Nor do we think there was any error in refusing instruction number seven, which proceeded upon the theory that the land was deeded to Dickey to defraud the creditors of Cox. The case does not appear to have been tried upon any such theory. One witness testified to a statement made by Cox to the effect that he had been involved and did not want real estate in his own name, as a reason for the deed being taken in the name of Dickey, but there is no evidence that he was owing any debts at the time the deed was made, or that he was owing any person at that time who could be defrauded by putting the title in the name of Dickey.

We have examined all the instructions requested by appellants and refused. The case was fairly presented to the jury by the instructions, and we are of the opinion that the cause was fairly tried and a proper conclusion reached under the evidence, and that there is no such error committed as should reverse the judgment.

Judgment affirmed, with costs.

Filed May 20, 1891.

Woods v. The Board of Commissioners of Tipton County.

No. 14,980.

WOODS v. THE BOARD OF COMMISSIONERS OF TIPTON
COUNTY.

NEGLIGENCE.—*Traveller on Highway.*—*Voluntary Intoxication.*—If a traveller on a highway, by reason of his own voluntary intoxication, exposes himself to danger and receives injuries which he could, and by the exercise of ordinary prudence would have avoided if sober, he is guilty of contributory negligence, and can not recover for such injuries.

INSTRUCTIONS TO JURY.—*Erroneous Instructions.*—*When Judgment not Reversed Therefor.*—Where the record affirmatively shows that the verdict is right upon the evidence, the judgment will not be reversed because the court has erred in the instructions given to the jury.

From the Hamilton Circuit Court.

*R. R. Stephenson and W. R. Fertig, for appellant.**G. H. Gifford, T. J. Kane and T. P. Davis, for appellee.*

MCBRIDE, J.—This was a suit by the appellant to recover damages for personal injuries sustained by him, and alleged to have been caused by a defective approach to a bridge in Tipton county.

Several errors are assigned and argued, but the conclusion we have reached, after a careful consideration of the evidence, renders it unnecessary to consider or pass upon them.

The facts, as shown by the evidence, are substantially as follows:

Adjoining the town of Tipton, in Tipton county, and forming its southern boundary, is Cicero creek. For a great many years a bridge was maintained over said creek at a point a short distance east of the southern terminus of Main street. In June, 1885, the board of county commissioners adopted an order condemning said bridge, and declaring it to be unsafe and unfit for travel. They erected a new bridge, placing it at the south end of Main street. The new bridge was completed and received by the county in September, 1885. Thereafter travel was mainly over the new bridge. The old

128	289
134	600
128	289
157	445
128	289
160	406
128	289
171	669

Woods v. The Board of Commissioners of Tipton County.

bridge, however, was left standing, and the commissioners gave it to one James H. Fippen on condition that he place barriers at the approaches to prevent people driving on it, and that he should tear it down and remove it, and turn over to the county the bolts used in its construction. Barriers were erected but were removed by some person. The old bridge was approached by embankments, extending for some distance from each end, and several feet in height. After the completion of the new bridge the roadway along the approaches to the old bridge became partially overgrown with weeds, and in the year 1886 the approach to the south end was partially washed away, leaving a chasm six or seven feet wide, extending in the shape of the letter V nearly across the roadway, and cut down to a considerable depth. This was the situation on the 9th day of March, 1887. At that time the appellant was a farmer, residing at Atlanta, in Tipton county, and on the day in question he came to Tipton, where, by his own testimony, he spent the day, drinking and gambling.

By the testimony of the town marshal and others he became very deeply intoxicated, and was so noisy and troublesome that the marshal, after trying in vain to persuade him to leave town, twice had men take him out, but each time he returned, and about sunset, finding him still on the street, the marshal threatened to lock him up if he did not go, and he then got into his buggy and started off. The marshal says he was maudlin drunk, and staggered. This time he left town, crossing Cicero creek over the new bridge. After getting out of town he decided to return, and attempted to do so by way of the old bridge. When within one hundred and fifty feet of the bridge he stopped his horse and was seen and heard by several. He was boisterous, was shouting, and was conducting an imaginary auction. He then drove upon the south approach to the old bridge. When his horse reached the washout or chasm extending across the roadway, being sober, he stopped and refused to proceed. Appellant

Woods v. The Board of Commissioners of Tipton County.

urged him by shouting and by slapping him with the lines until he sprang forward and cleared the chasm, taking the buggy with him. The shock of the buggy's plunge threw the appellant out, and he fell into the creek, receiving very severe and painful injuries. The injuries were of such a character that he suffered intensely for months, was compelled to submit to several very severe surgical operations, and will necessarily be a sufferer all the remainder of his life.

He was injured just about dark, but from the evidence it is plain that if he had been sober, when his horse stopped on the brink of the washout, he could and would have seen it and would have escaped injury. He was plainly visible to parties distant from him from 150 to 200 feet, and it was from that distance that men saw him fall and ran to his assistance.

On this state of facts, waiving all question as to whether or not the county could be held liable at all for injuries received by one in attempting to cross said bridge (a question upon which we intimate no opinion), it is clear that the appellant could not recover, and that the verdict of the jury was right.

To entitle him to recover from the county he was required to show that he was himself free from contributory negligence. When one, by reason of his own voluntary intoxication, exposes himself to danger and receives injuries which he could, and by the exercise of ordinary prudence would have avoided if sober, he is guilty of contributory negligence and can not recover for such injuries. In such case voluntary intoxication is in itself negligence.

It is not true as suggested by counsel at one place in the record, that a man has the right to become intoxicated, and in that condition travel along the public highways. The Legislature has declared that he who is found in a public place in a state of intoxication thereby commits a crime for which he may be fined and imprisoned. Section 2091, R. S. 1881.

Woods v. The Board of Commissioners of Tipton County.

From one stand-point, the appellant's condition appeals strongly to the sympathies. A vigorous man, in robust health, he was by this occurrence broken in constitution and made a life-long sufferer. If the facts were such as to make the county liable we would not have set aside a verdict awarding him most liberal damages. But the evidence, showing as it does, that his injuries are the result of his own voluntary surrender of his ability to see and guard against danger, he has no claim on the county for compensation, whether the county authorities had or had not fully acquitted themselves of the duty they owed the public.

Of the errors assigned and argued, we will only say that appellant complains of three questions which the court, over his objections, allowed a witness to answer. The questions and answers were competent, and the court did not err.

We think the court did err in certain instructions given, which is the only other error argued, and possibly in some refused, but from the facts clearly shown to exist in this case, the plaintiff can not recover, and the verdict is right. The ends of justice would not be subserved by requiring a re-trial of the issues.

Section 658, R. S. 1881, contains the following: "Nor shall any judgment be stayed or reversed, in whole or in part, when it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below," and this court has many times decided that where the record affirmatively shows that the verdict is right upon the evidence the judgment will not be reversed because the court has erred in the instructions given to the jury. *Stockwell v. Brant*, 97 Ind. 474; *Simmon v. Larkin*, 82 Ind. 385; *Norris v. Casel*, 90 Ind. 143; *State, ex rel., v. Ruhlman*, 111 Ind. 17; *Cassady v. Magher*, 85 Ind. 228; *Ledford v. Ledford* 95 Ind. 283; *Sanders v. Weelburg*, 107 Ind. 266.

Judgment affirmed, with costs.

Filed May 16, 1891.

Shattuck v. Cox.

No. 14,016.

SHATTUCK v. COX.

SUBROGATION.—Volunteer.—Note Given by Third Person in Payment of Judgment.—Subrogated to Lien of Judgment.—Judgment Over.—The owner of land gave a mortgage upon it, which was foreclosed, and the land bought in at sheriff's sale by the mortgagee for one-half the amount of the debt. The plaintiff, after the sale, filed a transcript of the judgment in an adjoining county. One C., by agreement all around, then executed his note, for four-fifths of the debt to the mortgagee, and the mortgagor agreed with C. to pay the remainder due on the foreclosure, and he had so paid him. By agreement C. took an assignment of the sheriff's certificate as a security for the liability he incurred in giving the note to the mortgagee. C. was compelled to pay the note he had given. *Held*, that C. was entitled to be subrogated to the lien of the judgment upon the land in the county where it was rendered, and was also entitled to a judgment for the sum in excess of the value of the land.

From the Clay Circuit Court.

N. G. Buff, for appellant.

G. A. Knight, J. G. Williams and J. T. Scott, for appellee:

ELLIOTT, J.—The facts stated in the appellee's complaint are, in substance, these: On the 19th day of April, 1872, the appellant was indebted to John Collier in the sum of twenty-five hundred dollars, and to secure the payment of the debt executed a mortgage on land in Sullivan county. In October, 1873, Collier instituted a suit to foreclose the mortgage, and on the 21st day of January, 1874, obtained a judgment for \$2,210.75, and a decree of foreclosure. On the 29th day of August, of that year, Collier bought the land at the sale made by the sheriff upon the decree, and received a certificate. He bid for the land \$1,250. On the 25th day of April, 1875, he filed a transcript of the judgment in the clerk's office of Vigo county. Appellant desired to redeem the Sullivan county land, and he proposed to Cox, the appellee, that he should execute his promissory note for \$2,000, and thus effect the redemption, and he

128	293
130	291
128	293
131	254
131	580
128	293
150	493

Shattuck v. Cox.

also agreed to secure the money to pay the remainder due upon the Collier judgment. To indemnify the appellee against loss on the \$2,000 note it was agreed that he should obtain from Collier an assignment of the sheriff's certificate. Five days prior to the expiration of the year for redemption, the appellee executed to Collier his note for \$2,000, and the appellant paid to Collier the sum of five hundred dollars. Pursuant to the agreement of all the parties, Collier assigned the certificate to Cox, and also assigned the judgment. Appellee was compelled to pay, and did pay, the note to Collier. Of the sum paid by the appellee the appellant repaid to him \$129, leaving the remainder entirely unpaid. The complaint asks that the lien of the judgment upon the Sullivan county land be enforced and that the plaintiff be awarded judgment for the sum in excess of the value of that land.

The complaint is unquestionably good. The appellee paid the money at the request of the appellant and to save his property, so that there is privity of contract. As the appellee was not a volunteer he was entitled to be subrogated to all the rights of Collier under the judgment and certificate. *Lowrey v. Byers*, 80 Ind. 443. It would be iniquitous to permit the appellant to secure the benefit of the appellee's money and deny the appellee the right to the security which the creditor held. As the Sullivan county land was not of sufficient value to pay the debt due the appellee he was entitled to judgment for the remainder of his claim.

The complaint is good as to all the relief prayed, but if it were good only as to part it would repel a demurrer. *Bayless v. Glenn*, 72 Ind. 5.

The appellee's counsel stoutly contend—and their contention is supported by the record recitals—that it affirmatively appears that the evidence is not all in the record. As the evidence is not all in the record we can not consider

Board of Comm'rs of Fountain Co. v. Board of Comm'rs of Warren Co.

the question whether the finding of the trial court is or is not sufficiently supported.

No motion was made to modify the judgment, nor is there any specification of error challenging the sufficiency of the decree or the special finding.

Judgment affirmed.

COFFEY, J., did not take any part in the decision of this case.

Filed May 16, 1891.

No. 15,248.

BOARD OF COMMISSIONERS OF FOUNTAIN COUNTY v. BOARD OF COMMISSIONERS OF WARREN COUNTY.

STATUTE.—Rules for Construing.—In the construction of a statute the court, in order to ascertain the intention of the Legislature, will look to the letter of such statute, to it as a whole, to the circumstances under which it was enacted, to the old law, if any, to the mischief to be remedied, to other statutes, to the rules of the common law, to the sources from which it was derived, to the general principles of equity, to its effect, and to the condition of affairs when it was enacted.

BRIDGES.—Bridge Over Boundary Stream.—Cost of Construction, or Repairing.—Consent.—One county can not purchase nor construct a bridge over a stream forming the boundary line between it and an adjoining county, and compel such adjoining county to pay its proportionate part of the expense; nor can it compel such adjoining county to pay its proportionate part of the cost of repairing such a bridge. Such adjoining county, to be liable, must consent to such purchase, or erection, and mere silence, when the first county serves notice of its intention to purchase, or build, such a bridge, is not such a consent as will render such adjoining county liable to pay a proportionate share of the cost.

SAME.—A County May Build a Bridge Over its Boundary Line.—A county may purchase, or build at its own expense, a bridge over a stream between it and an adjoining county; which bridge, when so purchased or built, will belong to the county buying, or building it.

From the Montgomery Circuit Court.

128	296
130	571
128	296
135	52
128	295
146	146
128	295
151	526
128	295
157	370

Board of Comm'rs of Fountain Co. v. Board of Comm'rs of Warren Co.

T. F. Davidson and *H. H. Dochterman*, for appellant.
C. V. McAdams, for appellee.

COFFEY, J.—This was an action by the appellant against the appellee to recover for money expended by the former in the purchase of a toll bridge across the Wabash river, to recover for money expended in the construction of a bridge, and for money expended in the repair of a bridge.

The complaint consists of three paragraphs.

The material facts alleged in the first paragraph of the complaint are, that the board of commissioners of Fountain county in the year 1886 purchased a certain described toll bridge across the Wabash river, near the city of Covington, part of which bridge, with its approaches, is in Fountain county and another part in Warren county. The bridge was purchased for the purpose of making it free to the public, and the price paid was \$18,000, all which was paid by Fountain county. On the 11th day of June, 1886, the board of commissioners of Fountain county, when in regular session, found and entered of record that public utility and convenience required the purchase of said bridge and the approaches thereto from the then owners, and that the same should be made free and subject to the public use without the payment of toll, and at the same time entered of record a resolution expressing and declaring its willingness to aid and join the board of commissioners of Warren county in the purchase of said bridge and approaches, and ordered of record that a certified copy of the finding and resolution should be made out and delivered to and served on the board of commissioners of Warren county. A certified copy of these proceedings was served upon and delivered to the board of commissioners of Warren county on the 15th day of the same month. The board of commissioners of Warren county neglecting and refusing to join in the purchase of the bridge, Fountain county purchased it on the 21st day of July, 1886, and dedicated it to the public use.

Board of Comm'rs of Fountain Co. v. Board of Comm'rs of Warren Co.

This paragraph seeks to recover from the appellee a portion of the money paid by Fountain county for the bridge, and is drawn upon the theory that Warren county is liable to pay for the bridge a sum in the proportion its taxable property bears to the taxable property of Fountain county.

It appears from the allegations in the second paragraph of the complaint that for a long time prior to the year 1886 the *Attica Bridge Company* owned a toll bridge across the Wabash river, where the river forms the boundary between the counties of Fountain and Warren, at the city of Attica, in Fountain county. In the year 1886 the toll bridge was destroyed by a cyclone, and the bridge company declining to rebuild the same, the board of commissioners of Fountain county purchased its interest in the abutments, piers and approaches, and erected thereon an iron bridge at a cost of \$45,000.

This paragraph contains the same allegations as the first in relation to the findings, orders, resolutions and notice to the board of commissioners of Warren county, and alleges that the board of commissioners of Warren county declined to take any action thereon, and declined to join with the board of commissioners of Fountain county in the purchase of said abutments, piers and approaches, and in the erection of said bridge.

This paragraph seeks to recover from Warren county its proportion of the said sum of forty-five thousand dollars.

The third paragraph of the complaint alleges, substantially, that in the year 1886 there was, and still is, a public bridge across the Wabash river at the city of Covington, where said river forms the boundary line between the counties of Fountain and Warren; that said bridge was jointly owned and under the control and management of the boards of commissioners of Fountain and Warren counties; that the same became so out of repair that it was dangerous to travellers, and that after the necessary findings, orders, resolutions and notice to the board of commissioners of Warren county, the

Board of Comm'rs of Fountain Co. v. Board of Comm'rs of Warren Co.

board of commissioners of Fountain county proceeded to and did repair the bridge at a cost of sixteen hundred dollars.

This paragraph seeks to recover from Warren county its proportion of the costs of the repairs therein named.

To each of these several paragraphs the court sustained a demurrer. The questions presented for our consideration relate to the propriety of this ruling.

The question presented by the demurrer to the first and second paragraphs of the complaint involves the power of the board of commissioners of Fountain county to impose upon the county of Warren the indebtedness described in said paragraphs, without the consent of the latter county. The solution of the question depends upon the construction to be placed upon sections 2880 to 2884, R. S. 1881.

It is contended by the appellant that the service of the notice, described in the complaint, upon the board of commissioners of Warren county, had the force and effect of the service of an ordinary summons, and that the failure of such board to take action, and join with the board of commissioners of Fountain county in the purchase of the bridge named in the first paragraph, and in the erection of the bridge named in the second paragraph, within thirty days from the service of such notice, conferred upon the latter board the power to purchase the first bridge and erect the second, and charge Warren county with its proportion of the expense incurred in such purchase and erection.

The primary object in construing any statute is to arrive at the intention of the Legislature which enacted the statute to be construed. In doing so we will look to the letter of the statute, to the statute as a whole, to the circumstances under which it was enacted, to the old law, if any, to the mischief to be remedied, and like matters. *Hunt v. Lake Shore, etc., R. W. Co.*, 112 Ind. 69.

It is not to be expected that a statute which takes its place in a general system of laws, will be so perfect as to require

Board of Comm'rs of Fountain Co. v. Board of Comm'rs of Warren Co.

no support from the rules and statutes of the system of which it becomes a part.

In construing a statute it is proper to look to other statutes, to the rules of the common law, to the sources from which the statute was derived, to the general principles of equity, to the effect of the statute and to the condition of affairs when the statute was enacted. *Humphries v. Davis*, 100 Ind. 369.

The construction contended for by the appellant is in conflict with the well known doctrine, that the board of commissioners of each county in the State is vested with the discretionary power to determine when and where bridges shall be constructed. Section 2885, R. S. 1881; *Bingham v. Board, etc.*, 55 Ind. 113; *Elliott Roads and Streets*, p. 35-38; *State, ex rel., v. Board, etc.*, 125 Ind. 247.

If the board of commissioners of Fountain county possesses the power to purchase or construct a bridge across a stream forming the boundary line between Fountain and Warren counties without the consent of the latter, and charge it with its proportion of the expense of such purchase or construction, then the board of commissioners of Warren county is wholly deprived of its discretionary power in the matter, and is made subject to the discretion of the board of commissioners of Fountain county in whose selection the people of Warren county have no voice.

How far such a construction is in conflict with the recognized doctrine of local self-government we need not stop to inquire. If the power contended for on this appeal exists, it is certain that the board of commissioners of Fountain county, in whose election the people of Warren county could not participate, and which does not represent them, may, without their consent, burden them with onerous debts which must be paid by taxation levied upon their property. Such a construction would seem to be at variance with the whole theory upon which our system of laws is constructed.

Board of Comm'rs of Fountain Co. v. Board of Comm'rs of Warren Co.

Furthermore, if the construction contended for by the appellant is to be adopted we have the anomalous case of a tribunal in one county serving summons in another county, beyond its ordinary jurisdiction, upon another tribunal of equal dignity and jurisdiction, and entering judgment and making orders against the tribunal so served, as upon a default. Certainly a construction so much at variance with our general system of laws, and followed by such unusual consequences, should not be adopted unless the language used is such as is not susceptible of any other reasonable construction, and this brings us to a consideration of the statute in question.

The original statute upon the subject we are now considering went into force May 14th, 1869. (Acts 1869, Sp. Session, p. 27). It included what are now sections 2880 to 2884, R. S. 1881. Section 2880, as it existed prior to its amendment in 1881 (Acts 1881, p. 87), provided that when public convenience required the erection or repair of any bridge across any stream forming the boundary line between two counties in this State, upon application therefor to the board of county commissioners of either county, such board should, if it thought it expedient, declare its willingness to aid in the erection or repair of such bridge, by resolution or order, and should cause notice thereof to be given to the board of commissioners of the other county interested therein. If the board of commissioners of both counties made such order or resolution, they were required, by concurrent resolution, to cause a survey and estimate to be made, submitting plans and specifications therewith, by some competent person, to be presented to their respective boards of commissioners at some specified time and place at or near the site of such contemplated bridge, where such boards were required to meet in joint session, to estimate and determine the kind of bridge which was to be erected, and the manner and time when payments should be made for the erection or repair of such bridge.

Board of Comm'rs of Fountain Co. v. Board of Comm'rs of Warren Co.

By sections 2881, 2882, 2883 and 2884 it was provided that such boards while in joint session should select one or more superintendents, who should have control of the erection or repair of the bridge, under such regulations as the boards might prescribe; make the necessary appropriations to pay for the same, which should be in proportion to the taxable property of the counties interested. Such bridge, when completed, belonged to the two counties, and each had a voice in regulating its use.

This law remained unchanged from the 14th day of May, 1869, until the 19th day of September, 1881.

The act provided for the erection or repair of one class of bridges only; that is, a class to be constructed by the mutual agreement and concurrence of the boards of commissioners of the two counties interested and bounded by the stream to be bridged.

Under this law it was held that such stream could not be bridged without the joint action of the county board of both counties, and that an attempt of the board of commissioners of one county to erect a bridge across such stream, without the concurrence of the board of commissioners of the other county, was without color of law. *Browning v. Board, etc.*, 44 Ind. 11.

The Legislature of 1880-81 amended section 2880 by adding thereto the following proviso: "*Provided*, That whenever the board of county commissioners of any county shall have notified the board of county commissioners of any county interested in the erection or repair of any bridge, as specified in this section, and such board of county commissioners so notified, shall fail or refuse, for the period of thirty days, to accept or to act on the same, by joining in the building or repair of such bridge, then, in that event, the board of county commissioners of such county passing such order, may, if in their opinion public convenience requires the same, build or repair said bridge, under the same rules and regulations as are now or may be in force for the building and re-

Board of Comm'rs of Fountain Co. v. Board of Comm'rs of Warren Co.

pair of bridges wholly within the county, after first having obtained the consent and permit of the land-owner in the adjoining county, whose land will be occupied by such bridge, to the building of the same." (Acts 1881, p. 87).

The statute, as amended, provides for two classes of bridges, namely :

First. Such bridges as are constructed across a stream which forms the boundary line of two counties, built by the mutual agreement and concurrence of the boards of commissioners of the two counties.

Second. Such bridges as are constructed across streams constituting the boundary line between two counties, built by the board of commissioners of one county only, under such rules and regulations as are in force for the building or repair of bridges wholly within one county.

In our opinion sections 2881 to 2884, R. S. 1881, inclusive, have no application to bridges of the second class. They were enacted with reference to the first class only, as at the time they were enacted no provision existed for the second class.

It doubtless often occurs that it is of great importance and convenience to one county to bridge a stream forming the boundary line between it and another county, while such other county has no particular interest in the bridge. Under the construction placed upon the statute prior to its amendment, the county interested had no power to act, unless the adjoining county would join in its erection, and pay a proportion of the expense. We think it was the intention of the General Assembly, when it passed the amendment in question, to confer on counties desiring to do so the power to construct bridges on streams forming the boundary line between them and other counties at their own expense, where the adjoining county was unwilling to join in the construction of such bridge. A bridge thus purchased, or constructed, belongs to the county purchasing, or constructing, the same, and the adjoining county has no interest therein, nor any voice in its management.

Board of Comm'rs of Fountain Co. v. Board of Comm'rs of Warren Co.

This construction harmonizes the statute before us with our general system of jurisprudence, and does no injustice to either party. It leaves counties which are sufficiently interested in the construction of a particular bridge to warrant them in incurring the expense, to construct bridges across streams forming their boundary lines; while it relieves counties who have no such interest from the burden of paying for the construction or repair of bridges in which they have but little, if any, interest.

In our opinion Warren county is not liable to the county of Fountain for any portion of the money paid for the purchase of the bridge named in the first paragraph of the complaint, nor is it liable for any portion of the money paid for the erection of the bridge named in second paragraph of the complaint.

This conclusion is not in conflict with the *Board, etc., v. Thompson*, 106 Ind. 534, as the only question there involved, and the only question that could be adjudicated, related to the power of the board to purchase the bridge described in the complaint in that case. No question of that character is involved in this case.

It is conceded here, as we understand the briefs, that the money expended for the repairs named in the third paragraph of the complaint was for repairs made on the bridge described in the first paragraph of the complaint.

As we have seen, Warren county has no interest in that bridge, and no voice in its management or use. It is the property of Fountain county, and is governed by the same rules as if it were wholly located in that county. Warren county is not liable for any repairs made upon such bridge by the county of Fountain.

The circuit court did not, in our opinion, err in sustaining the demurrer to each paragraph of the complaint before us.

Judgment affirmed.

Filed March 10, 1891; petition for a rehearing overruled May 16, 1891.

No. 14,632.

MCCOLLUM ET AL. v. UHL.

128	304
133	542
133	653
128	304
134	551
136	83
128	304
137	445

DRAINAGE.—No Notice.—Collateral Attack.—An order made establishing a ditch without notice to those interested is void; but if only part have been notified, it is void as to all those who have not received notice. Those who have not received notice may attack the proceeding collaterally.

SAME.—Collateral Attack for Want of Notice.—Pleading.—The person who collaterally attacks an order establishing a ditch and the assessments incident thereto, because of lack of notice, must aver in his complaint, fully and specifically, that no notice was given.

SAME.—Notice.—Presumption as to Giving, and as to the Order Establishing the Drain.—In a collateral attack upon an order establishing a ditch, and making an assessment, it will be presumed that the court establishing the ditch found, as a jurisdictional fact, that a notice was duly given before it entered the order.

SAME.—Priority of Tax and Ditch Lien.—The lien of the State for taxes is paramount and superior to the lien of a ditch assessment.

SAME.—Redemption from Tax Sale by Holder of Ditch Lien.—The holder of a ditch lien has a right to redeem from a sale of the land for taxes.

SAME.—Foreclosure of Tax Lien.—Parties to Ditch Proceeding.—Party Acquiring Ditch Lien.—The holder of a tax lien seeking to foreclose it after a ditch is established, and before its construction is let, should make parties to his petition all who were parties to, and affected by, the ditch proceedings; and any person acquiring the ditch lien, or any part of it, by reason of his having constructed the ditch, after the commencement of the proceeding to foreclose the tax lien, will not be bound thereby, unless the parties to the ditch proceedings are made parties to the tax lien foreclosure proceedings.

From the White Circuit Court.

Robert Gregory, for appellants.

E. B. Sellers and *W. E. Uhl*, for appellee.

MCBRIDE, J.—This was a suit by appellee against appellant, McCollum, and Robert Breckinridge, treasurer of White county, to enjoin the collection of a ditch assessment.

The facts, as alleged in the complaint, are substantially as follows:

McCollum et al. v. Uhl.

On the 5th day of March, 1883, the then treasurer of White county sold the west half of the northwest quarter of section twenty-nine (29), township twenty-seven (27) north, of range three (3) west, in said county, for taxes which had been assessed against the land from the year 1874 to 1882, inclusive, and were then delinquent. Martin L. Bundy was the purchaser, paying \$126.81.

The land was not redeemed, and on the 10th day of August, 1885, the auditor of the county made Bundy a deed.

On the 1st day of October, 1885, Bundy commenced an action in the White Circuit Court to quiet his title to the land. In this he failed, and the court, instead of quieting his title, foreclosed his lien for taxes, and the land was sold by the sheriff on the 20th day of February, 1886, under the decree of foreclosure thus rendered, for \$308, appellee being the purchaser and receiving a sheriff's deed. He claims title under this deed.

On the 3d day of December, 1878, a petition was filed in the auditor's office of White county asking the establishment by the board of commissioners of said county of a ditch affecting the lands in controversy. On the 3d day of March, 1879, said board appointed viewers, who filed their report with the auditor on the 26th day of April, 1879, and on the 5th day of June, 1879, said board ordered that said ditch be established. The viewers, by their report, set apart and apportioned to said land, together with the east half of the northeast quarter of section thirty (30), a share of the work of constructing said ditch, and estimated the cost of the same at \$261.62, and also apportioned to said two tracts together \$14.50 of the costs and expenses of establishing the ditch. On the 23d day of June, 1886, the auditor of the county sold the contract for constructing that portion of the ditch apportioned to said two tracts of land to appellant George McCollum, who did the work, and received from the

McCollum *et al.* v. Uhl.

auditor a certificate showing the work completed, and that there was due to him \$315 for the same.

This amount the auditor charged against the land on the tax duplicate, and when this suit was commenced the county treasurer was taking steps to collect it by a sale of the land. The prayer of the complaint asks that appellee's title be quieted as against the assessment, and that the treasurer be enjoined from attempting to enforce collection by sale of the land.

Appellee bases his contention upon two grounds. He says:

"1. The owner of the land had no notice of the ditch proceedings. They are therefore a nullity as to him, and the assessment against his land is invalid, and constitutes no lien."

"2. The lien of the State for taxes is paramount, and the sale and deed under the decree foreclosing the tax lien operated to extinguish the lien of the ditch assessment, even if it was valid in the first instance."

The averments of the complaint relative to notice of the ditch proceeding are as follows:

"And the plaintiff says that the then owner of said land (as shown by the records in the recorder's office of said county) did not sign said petition, nor was he named therein, and that said auditor never gave him any notice of the pendency and prayer of said petition, or of the time set for the hearing thereof by posting, publication in any newspaper, or otherwise. And said auditor did not at any time before the hearing of said petition by said board, and the establishment by it of said ditch, post or publish any notice in any newspaper of the pendency and prayer of said petition, and the time set for the hearing thereof in which the said owner of said real estate was named. And that said board did not find or adjudge in any order made by it in said proceedings that said owner of said lands had received any notice what-

McCollum *et al.* v. Uhl.

ever of the pendency of said petition, nor of the time set for the hearing of the same."

It is also averred that the report of the viewers was not recorded.

The statute under which the order was made for the establishment of the ditch in question required the auditor to give notice, and prescribed that the notice should contain "the names of the owners of the lands" that would be affected thereby. 1 R. S. 1876, p. 428, sec. 2. An order made without notice would be void. If notice was given as to some but not as to all the owners of the lands affected, those not notified would not be bound by the order made, and could attack it collaterally. *Brosemer v. Kelsey*, 106 Ind. 504; *Davis v. Lake Shore, etc., R. W. Co.*, 114 Ind. 364.

The attack in this case upon the order being collateral, it is incumbent on the appellee to show that the proceeding is void, and relying upon want of notice to render it void the averments of the complaint must be full and specific that no notice was given. In this respect the complaint is fatally defective.

The averment that no notice was given to the then owner of the land, as shown by the records in the recorder's office, is not sufficient.

The statute required notice to the owner of the land, whether he was shown to be such owner by the records in the recorder's office or not, and the complaint does not contain an averment that notice was not given to the owner. This qualified negation of notice is not sufficient. The attack here made upon the order is collateral. Before the board of commissioners could be authorized to make an order establishing the ditch the law required the giving of notice. The giving of the notice was jurisdictional, and the fact of such notice was a jurisdictional fact which, in the absence of express averment to the contrary, will, when the order is attacked collaterally, be presumed to have been found by the board prior to making the order. *Board, etc.*,

v. *Hall*, 70 Ind. 469; *Pendleton, etc., T. P. Co. v. Barnard*, 40 Ind. 146; *Evansville, etc., R. R. Co. v. City of Evansville*, 15 Ind. 395; *Board, etc., v. Markle*, 46 Ind. 96; *Jackson v. Smith*, 120 Ind. 520.

The appellee sought to meet this by averring that "said board did not find or adjudge, in any order made by it in said proceeding, that said owner of said lands had received any notice whatever of the pendency of said petition, nor of the time set for hearing of the same," but it will be observed that this averment is qualified, as is the averment relative to the giving of notice. The "said owner" referred to being "the then owner as shown by the records in the recorder's office." This averment is even more defective than that relative to the giving of notice. It is not averred that the board did not find or adjudge that notice was not *given* to the owner of the land, but that they did not find or adjudge that notice was not *received* by said owner.

With reference to the remaining proposition, appellee's premise is unquestionably correct. The lien of the State for taxes is paramount and is superior to the lien of the ditch assessment. It does not follow, however, that because appellee has acquired the paramount and superior lien upon the land appellant may not also have a valid and subsisting lien thereon, although junior and subordinate. The order establishing the ditch was made June 9th, 1879. The lien of the assessment attached at that time. Appellee's tax lien was not foreclosed until the 15th day of December, 1885. There seems to have been no effort to foreclose the tax lien as against the ditch assessment. Appellee in his brief says this was because at that time no "person or legal entity of any kind or description amenable to legal process had acquired any interest in or lien against the land by virtue of the ditch proceeding." It is not material why there was no foreclosure as against the assessment. It is enough that there was none. That lien still exists and its holder is en-

McCollum *et al.* v. Uhl.

titled to enforce it subject to the superior rights of appellee under his paramount lien.

Such rights as the appellant McCollum has must, however, be worked out through the county treasurer. If the owner of the land will not pay the assessment it is the duty of the treasurer to sell the land. Of course the purchaser will take it subject to appellee's claim, and must redeem from the tax foreclosure sale before he can realize any benefit from his purchase, but this we think he has equitably the right to do.

The court erred in overruling appellants' demurrer to the complaint. This renders it unnecessary to consider the other errors assigned.

Judgment reversed, with directions to the circuit court to proceed in accordance with this opinion.

Filed April 1, 1891.

ON PETITION FOR A REHEARING.

MCBRIDE, J.—Appellee's counsel have filed a very earnest and ingenious brief in support of their petition for a rehearing. They say two questions are involved:

1st. Is it possible to extinguish the lien of a ditch assessment by the foreclosure of a superior tax lien?

2d. Who are necessary parties to a suit for that purpose?

There can be no doubt that it is possible to extinguish the lien of a ditch assessment by the foreclosure of a superior tax lien. No such question confronts us in this case, for the reason, as stated in the original opinion, that there was no attempt to foreclose the tax lien as against the ditch assessment.

Counsel now say: "Where a lien such as a ditch assessment exists, and has not reached the period of vesting, the effect of foreclosing a superior lien is not to bar an equity of redemption—none exists—but to extinguish the lien itself."

The error in appellee's position is, that he assumes that

McCollum *et al.* v. Uhl.

there can be a valid ditch assessment in which no one has an interest entitling him to be made a party to the proceeding seeking its extinguishment, and that it is possible, by a decree of court, to extinguish the lien of such assessment without having before the court any of the parties interested in it. The complaint shows the establishment, by order of the board of county commissioners, of a ditch across the land in question, and that the sum of \$261.53 was assessed against it as the proportion properly chargeable thereon for the construction of the ditch. This the complaint also shows was done long before the proceeding was commenced to foreclose the tax lien. All who were beneficially interested in the construction of the ditch were interested in the assessment thus made against the particular land.

A ditch established by order of the board of county commissioners, for the drainage of wet lands, although it may pass over the lands of many men, and be divided into many allotments for its construction, and the cost of construction may be apportioned to many different tracts, yet it is to be considered as an entirety, and the several allotments and assessments as parts of an entire system. For instance, suppose the allotment to the land in question was of the terminal section of the ditch, and unless it was constructed there would be no outlet, could it be said that the owners of lands living above and assessed for the construction of the ditch had no proprietary interest in such terminal allotments?

If appellees contention is right, after a ditch has been established a section may be cut out of it, or the outlet destroyed by the foreclosure of a tax lien upon some one of the tracts of land through which it is laid, in a proceeding to which none of those interested in the construction of the ditch are parties, although, as to the remaining tracts, the owners may still be compelled to construct their allotments, or, indeed, may have already done so. If this is true, there is at least one case in which the property rights of a citizen may be taken from him without due process of law. We

Mills et al. v. Hardy et al.

can not assent to such doctrine. In our opinion the petitioners, and other parties to the proceeding, assessed for the construction of the ditch, had such an interest in the assessment in question that its lien could not be extinguished by the foreclosure of the paramount lien without giving them their day in court.

The petition for a rehearing is overruled.

Filed May 10, 1891.

No. 14,965.

MILLS ET AL. v. HARDY ET AL.

DRAINAGE.—Appeal.—Parties.—Judgment for Costs.—Collateral Attack.—Under the drainage law of 1875 (Acts 1875, p. 97) an appeal from the board of county commissioners transfers the entire cause to the circuit court for trial *de novo*, and all the persons who were parties to the cause before such board are parties in the circuit court, and are bound by the judgment for costs rendered, and they can not attack it by an injunction to restrain its collection. Their remedy is by appeal.

From the Cass Circuit Court.

J. W. McGreevey and F. Swigart, for appellants.

J. C. Nelson and Q. A. Myers, for appellees.

OLDS, C. J.—In 1880 John McKinney filed his petition before the board of commissioners of Carroll county for the construction of a ditch as proposed and described in said petition. Under the act of 1875, Acts of 1875, p. 97, viewers were appointed and reported in favor of the ditch. Thereupon proper notice was given, and the 8th day of June, 1881, fixed for the hearing of the petition. At the time fixed for the hearing Alexander Hardy, Thomas Hardy and William Hardy filed a remonstrance against the construction of the proposed ditch. The grounds of remonstrance being, in substance, as follows:

128	311
136	459
128	311
148	150
128	311
155	311
155	656

Mills *et al.* v. Hardy *et al.*

First. That it was identical and the same ditch theretofore established by said board of commissioners.

Second. That there is now constructed on 11,194 feet of the proposed line a ditch in full operation of the same dimensions as the proposed ditch.

Third. That all persons mentioned in said petition as being interested, etc., have heretofore, by order of the board of commissioners, been assessed, and most of them have paid for the construction of the said ditch of like dimensions on the same line.

Fourth. That the construction of said ditch will not be conducive to the public health, convenience and welfare, nor will it be of public utility, and it is not necessary.

Fifth. That all of said ditch, except about 80 rods of the upper end thereof, has heretofore been dug and fully completed in accordance with the specifications of said proposed ditch; that the excavation of said 80 rods will drain a valuable pond of stock water on the land of the remonstrants, greatly damaging them in their business of stock raising in which they are engaged; that said remonstrants are now constructing a tile ditch to another part of their land where they can utilize it for stock water and wholly remove it from the land of said petitioner; that if removed and drained by said proposed ditch it will damage said remonstrants in the sum of \$2,000, and that the construction of said 80 rods of said ditch has been forever enjoined by an order of the Carroll Circuit Court and can not be constructed but in contempt of said court, which order is of record, in full force and unreversed.

Sixth. That the assessments made by the viewers, \$1,-760.15, as the costs of construction is false and fraudulent, in this, that 11,194 feet of the same is now constructed, and will cost nothing to make it, and that the construction of the remaining 80 rods would not cost more than \$424.85.

Reviewers were appointed, who reported against the remonstrants and in favor of the ditch, and the board of com-

missioners ordered said ditch established and constructed. This order was made at the September term, 1881, of the board of commissioners, and the remonstrants immediately appealed from the order in term time to the Carroll Circuit Court. A change of venue was taken to the White Circuit Court, and from there to the Cass Circuit Court. During the pendency of the proceedings William Hardy died, and his widow and heirs were made parties. A trial was had, an appeal taken to the Supreme Court, and the judgment reversed. The costs accruing subsequent to the error for which a reversal was ordered were taxed against the losing party, and a final judgment rendered in the cause establishing the ditch, and the remainder of the costs apportioned among the parties benefited by the construction of the ditch. The record of the proceedings in said cause was certified back to the board of commissioners of said Carroll county, and the amount properly apportioned charged upon the tax duplicate against the persons adjudged benefited by the construction of the ditch, including the appellants. The case appealed to this court is reported in *Hardy v. McKinney*, 107 Ind. 364.

These appellants, being those interested except the petitioner and remonstrants in the former suit, bring this suit against the petitioner and remonstrants, the auditor and treasurer of Carroll county, to enjoin the collection of the costs taxed against them.

The appeal and errors assigned present the question as to whether or not all of the parties interested in the ditch, and who were before the commissioners' court in the original proceedings were before the circuit court on appeal, so as to be bound by the final judgment rendered in said cause, or whether the appeal only brought before the circuit court the petitioner and the remonstrants.

In the decision in the case of *Hardy v. McKinney*, *supra*, it was held that on the appeal taken in the case the cause was in the circuit court for trial *de novo*, and that the court or jury trying the case succeeded to all the substantial

Mills et al. v. Hardy et al.

duties of the viewers and reviewers, and that the finding or verdict should be sufficiently specific upon every question involved to authorize a judgment finally determining all the matters in controversy.

Under the act of 1875, *supra*, the benefits are assessed and a portion of the work assigned to each parcel of land in proportion to the benefits received. The remonstrance in this case affected the whole ditch. The case being for trial *de novo*, if the court found in favor of the remonstrants on the question of public utility it would terminate the case, and defeat the construction of the ditch. All of the parties assessed for its construction were interested in the result of the case in the circuit court. The circuit court, having the power of the viewers and reviewers, had the right to adjust and fix the assessments, and in case of a variance of the assessments against the remonstrants, or an assessment of damages in their favor, a readjustment in the apportioning and assignment of the work necessarily followed.

Our conclusion is that under the act of 1875, *supra*, the appeal transferred the entire cause to the circuit court for trial *de novo*, and all the persons who were parties to the cause before the board of commissioners were parties in the circuit court, and were bound by the judgment rendered, and they can not attack the judgment for costs in this collateral way. If the judgment was erroneous their remedy was by an appeal in the original case. *Wright v. Wilson*, 95 Ind. 408; *Meehan v. Wiles*, 93 Ind. 52.

Proper notice having been given to the appellants of the pendency of the proceedings in the commissioners' court, they were properly before the court on appeal taken in term time in the cause. They were in the circuit court without further notice.

There is no error in the record.

Judgment affirmed, with costs.

Filed May 15, 1891.

Hewett v. Fenstamaker.

No. 15,052.

HEWETT v. FENSTAMAKER.

TAXES.—*Injunction.*—*Payment of Part Due.*—*Tender.*—*Pleading.*—An injunction will not lie to prevent the collection of taxes, a portion of which are legally assessed, without an allegation in the complaint that the plaintiff has paid so much of the assessment as is lawfully due; or that he has tendered the same to the tax collector, and that he keeps the tender good by bringing the money into court for his benefit.

From the Henry Circuit Court.

J. M. Morris, for appellant.

J. H. Mellett, for appellee.

MILLER, J.—This was an action to enjoin the collection of taxes.

It was alleged in the complaint that a portion of the taxes assessed against the plaintiff for the year 1888 were illegal; that at the proper time the plaintiff tendered to the defendant a sum of money being, as he claimed, the full amount lawfully assessed against him, and demanded from the defendant a receipt in full for all taxes assessed against him then due; that the defendant refused to give him a receipt in full for his taxes, but demanded, and threatened to collect, the full amount of taxes assessed against him.

It nowhere appears in the complaint that the plaintiff paid the taxes which he admits were properly and lawfully assessed against him, and there is no pretense that the tender was kept good by bringing the money into court. The plaintiff does not even aver a willingness or readiness to pay his lawful taxes.

An injunction will not lie to prevent the collection of taxes, a portion of which are legally assessed, without an allegation in the complaint that the complainant has paid so much of the assessment as was lawfully due; or that he has tendered the same to the tax collector, and that he keeps the tender good by bringing the money into court for his benefit.

128	315
130	98
130	356
128	315
131	162
131	203
133	130

Reynolds v. Quick.

Brown v. Herron, 59 Ind. 61; *Morrison v. Jacoby*, 114 Ind. 84. In the latter case the reasonableness of the rule requiring the complaint to show that the tender is kept good by bringing the money into court, is so fully set forth that a citation of other authority is unnecessary.

It follows that the court did not err in sustaining a demurrer to the complaint, and rendering judgment for costs against the plaintiff, who is the appellant here.

Judgment affirmed.

Filed May 21, 1891.

No. 15,077.

REYNOLDS v. QUICK.

CHATTEL MORTGAGE.—*Recording*.—As between the mortgagor and the mortgagee or the latter's assignee, it is not necessary to record a chattel mortgage. As between them it is valid without recording.

SAME.—*Receiver*.—If a petition to foreclose a chattel mortgage shows that the mortgagor is insolvent, that the mortgaged property is not sufficient in value to secure the debt, and that there is danger of its removal beyond the jurisdiction of the court, it is sufficient to authorize the appointment of a receiver of such property.

From the Warren Circuit Court.

J. M. McCabe and *E. F. McCabe*, for appellant.

MCBRIDE, J.—This is an appeal from an order appointing a receiver for mortgaged chattels.

The suit was brought by the assignee of the mortgage, and of the notes secured thereby, against the mortgagor to collect the sum due on the notes and to foreclose the mortgage. There is no other defendant, and the notes are overdue. The appellant urges that as the complaint does not show that the mortgage was recorded within ten days it is void,

Leming v. Sale.

and that, as a consequence, the assignee acquired no interest or right in the mortgaged property entitling him to a receiver.

So far as the parties to a chattel mortgage are concerned, recording is not necessary to its validity. The statute provides only, that if not recorded it shall not be valid as against any other person than the parties thereto. The mortgagor can take no advantage of a failure to record it. Section 4913, R. S. 1881; *McTaggart v. Rose*, 14 Ind. 230.

The appellant also insists that sufficient reasons are not shown in the petition to authorize the appointment of a receiver. The petition shows the insolvency of the debtor; that the mortgaged property is not sufficient in value to secure the debt, and that there is danger of its removal beyond the jurisdiction of the court. This is sufficient.

The court did not err in appointing the receiver.

Judgment affirmed, with costs.

Filed May 21, 1891.

No. 15,143.

LEMING v. SALE.

DIVORCE.—Custody of Child.—Status Fixed by Decree.—How Status May be Changed.—The decree in a divorce suit awarding the custody of a child to one of the parties, fixes the status of the child as between the parties until modified or set aside for cause shown by some subsequent, or supplemental, proceeding in the same cause.

From the Warren Circuit Court.

W. P. Rhodes, for appellant.

E. Stansbury, for appellee.

COFFEY, J.—This was an application by the appellee against the appellant, made to the judge of the Warren Cir-

128	317
158	631
128	317
168	359

Leming v. Sale.

cuit Court, for a writ of *habeas corpus* to obtain the possession of a child.

The petition in the cause alleges that the appellee obtained a divorce from the appellant in the Warren Circuit Court in the year 1888; that in said cause the court decreed the custody of the child in controversy, which is the child of the parties to this suit, to the appellee; that the appellee placed said child in the care of his sister, from whom the appellant took it without the knowledge or consent of the appellee, and without the knowledge or consent of the sister, and that she had for some months secreted and kept the child from the custody of the appellee.

The appellee filed a return, in which she sought to justify her possession of the child, on the ground that it was to its interest to remain in her custody.

The court sustained exceptions to this return, holding that the decree in the divorce suit awarding the custody of the child to the appellee was conclusive between the parties, and settled the right of the appellee to such custody.

The only question presented for our consideration relates to the propriety of this holding.

Whatever may be the rule elsewhere, the question here presented is not an open one in this State. *Williams v. Williams*, 13 Ind. 523; *Baily v. Schrader*, 34 Ind. 260; *Sullivan v. Learned*, 49 Ind. 252; *Joab v. Sheets*, 99 Ind. 328.

It is settled by these cases that a decree of the kind under consideration fixes the *status* of the child as between its parents, and is conclusive between the parties until modified or set aside for cause shown by some subsequent, or supplemental, proceeding in the same cause.

There was no error in the ruling of the court below.

Judgment affirmed.

Filed May 22, 1891.

Parker v. Culbertson.

No. 15,053.

PARKER v. CULBERTSON.

ABATEMENT.—Plea of.—Purchase Price of Real Estate.—Action to Recover.—

Insufficiency of Plea.—In an action to recover the agreed purchase price of a tract of land conveyed by the plaintiff to the defendant, a plea in abatement is bad, which alleges that at the time the plaintiff conveyed the real estate to the defendant she had no legal title to the same, but that the legal title was in another, and that an action was pending against the defendant upon his warranty, he having conveyed the land, but which does not show that either the defendant or his grantees have been disturbed or interrupted in their possession.

From the Hendricks Circuit Court.

T. J. Cofer and *C. C. Hadley*, for appellant.

L. M. Campbell, for appellee.

OLDS, C. J.—This is an action by the appellee against the appellant to recover the purchase-money for a 40 acre tract of land in Hendricks county, Indiana, and for an 80 acre tract in the State of Illinois.

The complaint is in four paragraphs. The first paragraph alleges a sale and conveyance of the 40 acres by the appellee to the appellant and an agreement to pay \$1,200 for the same; that he has wholly failed to pay the same; that appellee at and before the execution of the conveyance was, and ever since has been and now is a married woman.

The appellant files what is termed a plea in abatement to this first paragraph, to which a demurrer was sustained, and this ruling is the only error discussed.

We do not deem it necessary to set out this answer, or plea in abatement, as it is termed. It alleges no facts making it good on the theory of a plea in abatement. It alleges that at the time the appellee conveyed the real estate to the appellant she had no legal title to the same; that the legal title was in one Kenney, and any possession taken or held by the appellee or the appellant, or his grantors, was fraudulent; that appellant sold and conveyed the land

Brighton *et al.* v. White.

by warranty deed to one Riggins, and Riggins sold and conveyed by warranty deed to one Hadley, and Kenney sold and conveyed his legal title to one Downard, and after this action was commenced Downard brought suit against Hadley for possession, in which action there was judgment in favor of Hadley; that Riggins defended said suit in the name of Hadley, and had now brought suit, which was pending in the circuit court, against the appellant upon his warranty, claiming \$1,000 damages on account of the failure of title, and money expended in defending the suit prosecuted by Downard. Prayer that the action abate until the final determination of the suit instituted by Riggins.

The facts alleged do not show that either the appellant or his grantees have been disturbed or interrupted in their title or possession. It alleges that one Kenney has the paramount title, but it also shows that in the contest and adjudication between Downard and Hadley, Downard holding under a title from Kenney, and Hadley under a title from the appellee, Hadley succeeded.

This answer does not allege facts constituting a good plea in abatement and there was no error in sustaining a demurrer to it.

Judgment affirmed, with costs.

Filed May 22, 1891.

No. 15,130.

BRIGHTON ET AL. v. WHITE.

128	320
4157	132
128	320
163	116
163	118
163	308

BANKS AND BANKING.—*Bank of Discount and Deposit.*—*Presumption as to.*

—As we have only one general statute providing for the organization of banks of discount and deposit, the presumption is, that a bank of discount and deposit was organized under that statute. The presumption is a rebuttable one, but such a presumption makes a *prima facie* case.

SAME.—*Transfers by Insolvent Bank.*—*Nullity of.*—*Preference of Creditors.*—*Assignments or transfers of evidences of indebtedness by an insolvent*

Brighton *et al.* v. White.

bank, with a view to preferring one creditor to another, are utterly null and void. Section 2697, R. S. 1881. A creditor taking an assignment in violation of the terms of the statute gets no shadow of title. *Blair v. Hanna*, 87 Ind. 298, distinguished.

EQUITY.—*Lien upon Real Estate.*—*Foreclosure of.*—*Equity Jurisdiction.*—*How Determined.*—Where a lien upon real estate is to be foreclosed, the equity power of the court is called into exercise, and the entire issue is for trial by the court. Where a specific decree is required there is an exercise of equity jurisdiction, and as the main feature of the case is equitable, it controls the incidents.

From the Clay Circuit Court.

S. W. Curtis, for appellants.

E. S. Holliday and *G. A. Byrd*, for appellee.

ELLIOTT, J.—The appellee's complaint is founded upon a note and mortgage executed by Alexander Brighton and Catherine Brighton to the Commercial Bank of Brazil, Indiana, and by the bank assigned to the appellee. The appellants, Croasdale, Jones and Sowers, were made defendants to answer as to their interest in the mortgaged premises.

The answers of the appellants are substantially the same upon the material point involved, although they severed in their defences so that a synopsis of one answer will sufficiently exhibit the question which controls this phase of the case. The answers allege that the note and mortgage were executed to the Commercial Bank of Brazil, Indiana; that it was a bank "of deposit and discount, organized under the laws of the State of Indiana;" that the note and mortgage were assigned to the plaintiff after it was known that the bank was insolvent; that the insolvency of the bank was known to its officers and to the plaintiff; that the plaintiff was a creditor of the bank, and the note and mortgage were assigned to him as collateral security and for the purpose of giving him a fraudulent and secret preference over other creditors.

The right of the appellee to maintain the suit depends upon his title to the instruments upon which his cause of

Brighton *et al.* v. White.

action is founded. It is quite clear that a plaintiff can not maintain a suit upon an instrument to which a positive statute forbids him from acquiring title. It is not legally possible for a plaintiff to acquire title where a positive statute declares that a transfer shall be utterly void. If, therefore, it be true that there is a statute declaring a transfer to a creditor by an insolvent bank to be utterly void, one to whom the transfer is made can not acquire a title. This must certainly be so where, as here, he accepts the transfer for the purpose of securing a preference and with knowledge of the bank's insolvency.

Our statute declares that assignments or transfers of evidences of indebtedness by an insolvent bank "with a view to the preference of one creditor to another—shall be utterly null and void." Section 2697, R. S. 1881. The statute is strong and its object plain. It means that there shall be no preference of creditors, and that all transfers for the purpose of creating a preference shall be absolutely ineffective. No title can pass. A creditor taking an assignment in violation of the terms of the statute gets no shadow of title. The statute operates upon the creditor as well as upon the bank; it fetters both, the one can not transfer nor the other accept.

If the bank through which the appellee claims as an assignee is within the statute, there was no valid assignment, for it is inconceivable that the appellee could obtain what his assignor could not transfer. If he could not obtain title, he can not maintain an action, so that the inquiry is narrowed to this: Do the answers show that the bank is one upon which the statute operates? In our opinion the answers show, *prima facie*, at least, that it is such a bank, for they aver that it is a bank "of discount and deposit," organized under the laws of Indiana.

As we have only one general statute providing for the organization of banks of discount and deposit, the presumption is that the bank, as it was one of discount and deposit,

Brighton *et al.* v. White.

was organized under that statute. It is declared in analogous cases that the presumption is, that corporations are organized under the general statute, and there is no reason why that presumption should not rule here. The presumption is, it is true, a rebuttable one, but such a presumption makes a *prima facie* case. *Louisville, etc., R. W. Co. v. Thompson*, 107 Ind. 442, and authorities cited. The answers make such a case as required a reply, for if the bank was not organized under the general law it was incumbent upon the appellee to make that fact appear. He has, unquestionably, a right to do this if he can, but he can not without an affirmative reply escape the effect of the allegations of the answers.

The trial court erred in sustaining the demurrers to the answers.

The case of *Blair v. Hanna*, 87 Ind. 298, is not in point. In that case a creditor was seeking to set aside a fraudulent conveyance, and it was held that he could not maintain the suit, because the right to sue was in the assignee in bankruptcy, while here the plaintiff is attempting to recover upon evidences of indebtedness, which a positive statute forbade the assignor from transferring. Here the question is as to the title to the instruments upon which the cause of action rests, and if the plaintiff has no title to the cause of action he can not invoke judicial assistance.

The trial court did not err in refusing the demand of the appellants for a jury trial. It is settled that where a lien upon real estate is to be foreclosed, the equity power of the court is called into exercise, and the entire issue is for trial by the court. *Carmichael v. Adams*, 91 Ind. 526; *Kimble Seal*, 92 Ind. 276; *Rogers v. Union, etc., Co.*, 111 Ind. 343 (346); *Field v. Holzman*, 93 Ind. 205; *Quarl v. Abbett*, 102 Ind. 233 (239); *Brown v. Russell & Co.*, 105 Ind. 46, and cases cited, p. 55; *Albrecht v. C. C. Foster Lumber Co.*, 126 Ind. 318; *Ex parte Sweeney*, 126 Ind. 583.

It is not meant, of course, that the necessity for applying general principles of equity requires that the case be treated

Nichols, Shepard & Company v. Burch *et al.*

as one for the chancellor, but it is meant that where the relief that must be awarded is essentially equitable, the case is one for the court. The distinction between the two classes of cases is, as a general rule, to be determined by ascertaining whether the decree is one operating specifically, as, for instance, in the foreclosure of liens, or one operating generally, as, for instance, in an ordinary money judgment. The maxim is that "Equity acts specifically," and where a specific decree is required there is an exercise of equity jurisdiction, and, necessarily, the main feature of the case is equitable, and as such controls the incidents. *Parker v. Indianapolis Nat'l Bank*, 126 Ind. 595; *City of Hammond v. New York, etc., R. W. Co.*, 126 Ind. 597.

Judgment reversed.

COFFEY, J., did not take part in the decision of this case.
Filed May 21, 1891.

128	324
138	279
128	324
150	369

No. 14,948.

NICHOLS, SHEPARD & COMPANY v. BURCH ET AL.

CHATTEL MORTGAGE.—*Fraud in Making Sale.*—*Liability of Mortgagor for Value of Property.*—*Release of Sureties.*—If the mortgagee of a chattel mortgage sell the property mortgaged under a power authorizing the sale, becoming the purchaser of it himself at an amount far below the value of the mortgaged property, but fails to give the requisite notice of the sale, and by misstatements and falsehoods prevents a fair competition at such sale, thereby being able to secure it at a price far below its value, the sale is merely a colorable one, wholly insufficient to bar the mortgagor's equity of redemption. The mortgagee will be held to account to the mortgagor or his sureties for the fair value of such property at the time of its appropriation; and if its value exceeded the debt, the debt is paid and the sureties released.

PRINCIPAL AND SURETY.—*Waste of Collateral Securities.*—*Release of Surety.*—If the payee of a debt hold any securities or collaterals to secure the payment of the debt, the surety has the right to insist upon their application to the payment of the debt; and if he waste them, the surety, to the extent of their value, is released.

Nichols, Shepard & Company v. Burch *et al.*

FRAUDULENT CONVEYANCE.—*Prior Contract.*—*Consideration Love and Affection.*—*Conveyance After Debt Created.*—A conveyance of real estate, in pursuance of a previously made contract, for natural love and affection, executed without a fraudulent intent after a debt is created, and which debt the debtor supposes is adequately secured by mortgage, is valid.

DEED.—*Parol Evidence to Show Consideration.*—Where the consideration of a deed is stated in general terms, as for love and affection, the true consideration may be shown by parol evidence in an action to set aside the conveyance as fraudulent.

From the Greene Circuit Court.

H. G. Shaw, A. G. Cavins, E. H. Cavins and W. L. Cavins, for appellant.

W. M. Moffett and C. E. Davis, for appellees.

MILLER, J.—This was an action on notes, and to set aside conveyances of real estate alleged to have been executed in fraud of creditors.

The cause was tried by the court, and resulted in a finding and judgment for the plaintiff on the notes, and for the defendants on that portion of the complaint asking to have the deeds set aside as fraudulent.

The complaint discloses the fact that on the 25th day of August, 1884, the appellees, Charles T. A. Burch and Fuel Burch, Jr., as principals, and the defendants Leonard G. Sparks and Fuel Burch, Sr., as sureties, executed to the appellant three several promissory notes aggregating the sum of \$1,700, as purchase-money for a certain engine and thresher sold to the principals in the notes; that on the 10th day of November, 1886, Fuel Burch, Sr., conveyed his real estate to the defendants, Elizabeth Burch, Chrystyan Burch, and John S. Burch, for the consideration of love and affection, with intent to cheat and defraud his creditors, and for no actual valuable consideration whatever; that on the 7th day of March, 1887, said Leonard G. Sparks conveyed his real estate to the defendant, Nancy Sparks, in fraud of his creditors, for a colorable consideration of \$800, but for no actual consideration whatever.

Nichols, Shepard & Company v. Burch *et al.*

The defendant, Elizabeth Burch, died, and, as to her, the action abated.

The defendants united in a general denial.

Charles T. A. Burch, Fuel Burch, Sr., and Leonard G. Sparks answered by way of set-off.

Fuel Burch, Sr., and Leonard G. Sparks answered jointly to so much of the complaint as asked a personal judgment against them as makers of the notes, in substance, as follows:

That they signed the notes as sureties, and not otherwise, for Charles T. A. Burch and Fuel Burch; that at the time the notes were executed their principals secured their payment by executing a mortgage on a certain steam engine and separator of the value of \$1,700 at the time, and of the value of \$1,500 when the notes became due; that at the maturity of the notes the plaintiff took possession of the mortgaged property, but failed to foreclose the mortgage, and failed and neglected to sell the property to the best advantage, and made no effort to realize anything like the value of the property, which, it is charged, was at the time of much greater value than the amount due on the notes; that the plaintiff, fraudulently and with intent to sacrifice the property, and get possession and title to the same for a merely nominal sum, made and held a pretended sale thereof under the mortgage, but gave no notice of the sale in any manner, and falsely and fraudulently represented to certain citizens of the county who had heard of the sale, and expected to become bidders on the property, that it was of the value of \$700 and no more, and that the plaintiff expected to bid that amount for the property; that, by their representations, expectant bidders were prevented from attending the sale and bidding on the property; that at the sale the plaintiff was the only bidder and purchased the property at the nominal sum of \$150; that by such fraudulent conduct they destroyed the defendants' rights of subrogation under the mortgage, and lost its value to them as an indemnity.

Wherefore they claim that they are released from liability on the notes.

A demurrer was overruled to this paragraph of answer, and this is assigned as error.

The mortgage referred to is not exhibited with the answer, and we are not informed what provisions, if any, were made for the sale of the property upon condition broken.

Assuming, as against the pleader, that the mortgage authorized the sale of the property at private or public sale, and the application of the proceeds upon the mortgage debt, we could not sustain the sale under the circumstances disclosed in this pleading; coupling the grossly inadequate sum realized at the sale, with the want of notice, and the affirmative acts charged against the plaintiff of preventing competition at the sale, we can come to no other conclusion than that the sale was a merely colorable one, wholly insufficient to bar the mortgagors' equity of redemption.

In the case of *Lee v. Fox*, 113 Ind. 98, which was a case where the sale was under a power contained in the mortgage, the court says: "The most that could be held in case the mortgagee became a purchaser at his own sale, made under a power, would be to cast upon him the burden of showing that the sale was fairly and openly made, in strict compliance with the power, and that the price paid was not so clearly and grossly disproportioned to the value of the property as to raise a presumption of fraud or bad faith." In the same case the court cites, with approval, from the case of *Davenport v. McChesney*, 86 N. Y. 242, a statement to the effect that where the sale was invalid, the mortgagor might disregard the sale and proceed for the value of the property over and above the debt and interest. The court also held that if the price paid at the sale was grossly inadequate, and the sale a merely colorable one, the mortgagee could be held to account for its fair value at the time of its appropriation. In this case the value of the property at the time of its ap-

Nichols, Shepard & Company v. Burch *et al.*

appropriation is charged to be greater than the amount of the debt at that time.

The sureties, while not parties to the mortgage, were interested in the debt thereby secured, and had a right to expect and insist upon the utmost good faith in the dealings between the creditor and the principals in the notes; they also had the right to insist that the creditor should not waste or unlawfully appropriate to his own use any securities or collaterals held by him to secure the payment of the debt, and in case of a disregard of this duty by the creditor, the surety is discharged to the extent of the value of the securities so wasted or appropriated. *Brandt Suretyship*, sections 261, 384; *Sterne v. McKinney*, 79 Ind. 578; *Sterne v. Bank of Vincennes*, 79 Ind. 549; *Crim v. Fleming*, 101 Ind. 154; *Moorman v. Hudson*, 125 Ind. 504.

The court did not err in overruling the demurrer to this paragraph of answer.

Objection is also made to the overruling of a demurrer to the separate answer of John S. Burch and Chrystyan Burch.

This answer is to so much of the complaint as seeks to set aside the conveyances to them as in fraud of creditors. The substance of this answer is that in the year 1880, before the execution of the notes in suit, and at a time when he was not in debt, Fuel Burch, Sr., entered into a verbal agreement with the defendants John S. Burch, and Fuel Burch, Jr., who is the husband of Chrystyan Burch, whereby in consideration of the support of the grantor and his wife, the real estate described in the complaint should be conveyed to them; that afterwards it was agreed that the portion of the land to be conveyed to Fuel Burch, Jr., should be conveyed to Chrystyan, his wife; that, in pursuance of this agreement, John S. Burch and Fuel Burch, Jr., at once began to, and ever since had continued to perform their part of the contract by supporting the grantor, in accordance with the terms of the contract; that in the year 1880 a written contract was drawn expressing this agreement, but not being in a satisfactory

Nichols, Shepard & Company v. Burch *et al.*

form was never delivered; that the conveyance mentioned was executed in pursuance of this agreement, without any fraudulent intent, and at a time when the defendants supposed that the notes mentioned in the complaint were amply secured by a chattel mortgage on the engine and separator, in purchase of which they were executed.

This answer avers that there was a valid consideration for the conveyance, that it was made in accordance with an agreement made long prior to the creation of the debt mentioned in the complaint, which agreement had been partly performed, and alleges that the conveyance was executed without any fraudulent intent, and at a time when it was supposed that payment of the notes sued on was amply secured by a chattel mortgage.

The demurrer admits all these averments to be true; and, if they are true, the conveyance could not have been fraudulent. *Hays v. Montgomery*, 118 Ind. 91; *Willis v. Thompson*, 93 Ind. 62; *Sedgwick v. Tucker*, 90 Ind. 271; *Brown v. Rawlings*, 72 Ind. 505.

It follows that the demurrer to this paragraph of answer was properly overruled.

The overruling of a motion for a new trial is assigned as error.

The deed from Fuel Burch, Sr., the validity of which is in controversy, states the consideration for the execution of the same as "natural love and affection."

The plaintiff objected to the introduction of evidence tending to show the agreement set forth in the answer of John S. Burch and Chrystyan Burch, assigning as objection to the admissibility of the evidence that oral evidence could not be received to contradict the recital in the deed that its consideration was natural love and affection.

Whatever may be the weight of authority in other States, the rule is now well established in this State that where the consideration is stated in general terms, evidence will be re-

Nichols, Shepard & Company v. Burch *et al.*

ceived to show the true consideration. *Hays v. Peck*, 107 Ind. 389.

In *Levering v. Shockey*, 100 Ind. 558, it was held that either party might show the true consideration for any purpose, except to defeat the operation of the conveyance as a valid and effective gift, although it might be entirely different from that expressed in the deed.

In *Kenney v. Phillipy*, 91 Ind. 511, parol evidence was received to show that the consideration of a deed, recited to be one dollar, was, in fact, natural love and affection.

The court did not err in ruling upon the questions concerning the admission of evidence.

We can not disturb the finding of the court in favor of the validity of the conveyance upon the ground that it was not sustained by sufficient evidence. Independent of the testimony introduced tending to sustain the good faith of the conveyances, there was evidence given from which the court might have concluded that, after deducting the value of the interests of the wives of Fuel Burch, Sr., and of Leonard Sparks, and other liens, there was nothing in excess of the amount allowed by law as exempt from execution, and consequently there could be no injury to the creditors. *Blair v. Smith*, 114 Ind. 114, and cases cited.

The amount due upon the notes, principal, interest and attorney's fees, at the time of the trial, was \$1,496.43. The court deducted from this amount the sum of \$500, and gave judgment for the remainder.

We think it evident, from the record, that the deduction was made on the ground of irregularity in the sale and value of the mortgaged property, in excess of the amount it realized at the sale. The evidence shows, without dispute, that the value of the mortgaged property was greatly in excess of the amount it realized at the sale. The plaintiff having sold the property under the power contained in the mortgage, without the assistance of a court of chancery, and having purchased the property at his own sale, the burden rests upon him to

Shull v. The Fontanet Co-Operative Mining Association *et al.*

show that the sale was in strict compliance with the power, and at a price not grossly disproportioned to the value of the property. *Lee v. Fox, supra.*

This we hold, with some hesitation, the plaintiff has not done.

We find no error in the record.

Judgment affirmed.

Filed May 23, 1891.

128	331
166	5

No. 14,709.

SHULL v. THE FONTANET CO-OPERATIVE MINING ASSOCIATION ET AL.

LIEN.—Labor Performed in Working Mine.—Expenses Incurred by Assignee.—Preference.—The costs and expenses, including wages of a laborer that he employed, incurred by the assignee of a mining property, are made by statute a preferred claim and lien upon the property assigned, prior to all other claims, even to those for labor incurred prior to the assignment of the property. Elliott's Supp., section 1598.

SAME.—Assignment of Property.—Foreclosure of Claim.—Innocent Purchaser.—Laborer's Claim.—A mining company made an assignment of all its property to F., authorizing him in the deed of assignment to operate and develop the mine, pledging him the property as security for any money he advanced of his own in developing the mine, and directing him to pay certain debts. Prior to the assignment a mortgage was given D. on the property assigned, and recorded. C. held a duly recorded mechanic's lien, and S. a valid claim for mining labor rendered the assignee. F. took possession of the property, advanced \$5,000, and a year afterwards foreclosed his lien except as against D., C. and S., and at the sale under the decree the Coal Bluff Mining Company purchased it. The plaintiff worked for F. in the mine, but the purchaser had no knowledge of his claim for wages.

Held, that the plaintiff was entitled to foreclose his lien for wages against the property in the hands of the purchaser, standing on the same basis with the claims of F.; and the fact of F. abandoning the trust and foreclosing his claims did not affect the plaintiff's lien or rights.

From the Vigo Circuit Court.

Shull v. The Fontanet Co-Operative Mining Association *et al.*

I. N. Pierce, for appellant.

A. M. Higgins, R. B. Stimson, S. C. Stimson and L. D. Thomas, for appellees.

OLDS, C. J.—The appellee the Fontanet Co-Operative Mining Association was the owner of certain real estate, coal mines and personal property in Vigo county. On the 9th day of September, 1885, it conveyed, and by written instrument transferred and sold, to appellee Foley the said real and personal property owned by the company in trust. By the terms of the trust, Foley was authorized and empowered to take possession of said property, operate the coal mines so conveyed, and to pay out of the net proceeds of said mines the debts of said association, and to use all the resources, funds and securities so conveyed and transferred to him, independent of all directions or control of said association, for the purpose of developing and equipping said mines. By the terms of the trust, the only interest in said property reserved to said association was the right to the residue thereof after said debts had been paid, and said Foley had reimbursed himself for his labor and expenditures in the execution of said trust.

Among the debts said trustee was to pay was a mortgage of \$1,000 on the property conveyed, executed by said Fontanet association to Blackford Condit on the 20th day of August, 1885, and duly recorded September 10th, 1885, which mortgage was duly assigned to the defendant Milton S. Durham, and was by him duly foreclosed by decree of the Vigo Circuit Court; also a lien upon the said property for material and labor furnished to said association and used in opening and developing said mine, for \$420.63, in favor of the appellee Joseph D. Carter, and duly recorded August 29th, 1885, which lien was duly foreclosed by said Carter by decree of the Vigo Circuit Court, October 11th, 1886. The appellee Schenker also had a valid claim for labor ren-

Shull v. The Fontanet Co-Operative Mining Association et al.

dered to said mining association in said mine for the sum of \$100.

Foley took possession of said property under said trust September 9th, 1885, and in the execution of said trust expended of his own funds \$5,000 for necessary costs and expenditures in the execution of said trust, which was secured to him by the pledge and possession of said property, by the terms of the trust, and by a mortgage thereon.

On the 13th day of November, 1886, said Foley, by decree of the Vigo Circuit Court, duly foreclosed his said pledge and mortgage upon all of said property against said mining association, subject to the liens of the claims of Durham, Carter and Schnenker; Schnenker's claim having been foreclosed in the same action.

On the 10th day of December, 1886, Foley duly caused an order of sale to be issued upon his said decree by virtue of which all the property of the Fontanet association was duly sold to the appellee the Coal Bluff Mining Company, subject to the claims of Durham, Carter and Schnenker, which claims the Coal Bluff Company purchased and held, and the Coal Bluff Company had no notice of appellant's claim.

The appellant was employed by Foley after Foley received the assignment of the property of the Fontanet Company, and worked in the coal mines from November, 1885, to April, 1886, his wages amounting to \$130.44, which were not paid by Foley, and he was not made a party to any of the suits for foreclosure of liens upon the property.

The appellant brings this suit, alleging the employment, the performance of the services, and that his claim is due and unpaid; asking to have a lien declared in his favor upon the property; making the appellees parties defendant, alleging they have, or claim to have, some interest in the property adverse to his.

The appellees, other than the Coal Bluff Mining Company, answer by denial. The Coal Bluff Mining Company

Shull v. The Fontanet Co-Operative Mining Association *et al.*

answers, alleging the facts as above set out. The appellant demurred to the answer, the demurrer was overruled, and exceptions were taken, and judgment rendered upon the demurrer.

This ruling is assigned as error.

The property of the Fontanet Association passed into the hands of Foley as assignee, with authority to run and operate the coal mine.

By section 1598, Elliott's Supplement, it is made the duty of the assignee to pay all debts due for manual labor before paying any other claims except the legitimate costs and expenses. The fair interpretation of this section is that the costs and expenses incurred by the assignee are made a preferred claim and prior lien upon the property to all other claims, even to those for labor incurred prior to the property being transferred to the assignee. The expense of operating the mine incurred by Foley was part of the costs and expense incurred by him. The assignment was made for the purpose of and power given to Foley to develop and operate the mine. The appellant's work was for labor in the mine performed for the assignee, Foley, and is a preferred claim.

Appellant's claim stands in the same relation to the property as does all the other expense incurred by Foley, and the appellant is entitled to share with Foley in the proceeds of the property of the company. The fact that Foley paid the other expenses incurred while operating the mine, and foreclosed his lien, not making the appellant a party, does not cut the appellant out from recovering what is justly due him for labor performed in the mine, developing and operating the mining property.

If the assignee, Foley, had closed up the business and paid the claims it would have been his duty to have first paid the expenses incurred by him, including the claims for manual labor in operating the mine, and next to have paid off the claims for manual labor incurred prior to the assignment.

The fact that he operated the mine for a time, or spent a large amount of labor and means in developing the mining

Hyland, Auditor, *et al.* v. The Brazil Block Coal Company.

property, and before realizing a sum as profits sufficient to pay the expense incurred he abandoned the trust, and sued and recovered what was due him individually, did not deprive laborers, whose claims had not been paid, of the right to have their claims adjusted and paid out of the funds in the order of their priority. This is in accordance with the equitable rights of laborers performing services for the betterment of property, or conducting a business rendered advantageous only by their labor, independent of any statute. See *Farmers Loan and Trust Co. v. Canada, etc., R. W. Co.*, 127 Ind. 250, and authorities therein cited.

The court erred in overruling the demurrer to the answer of the Coal Bluff Mining Company.

The judgment is reversed, at the costs of the appellees, with instructions to sustain the demurrer to the answer of the Coal Bluff Mining Company, and for further proceedings in accordance with this opinion.

Filed Feb. 18, 1891; petition for a rehearing overruled May 22, 1891.

No. 15,431.

HYLAND, AUDITOR, ET AL. v. THE BRAZIL BLOCK COAL COMPANY.

TAXES.—*Board of Equalization.*—*Organization.*—*Time of Meeting.*—A board of equalization must meet and organize as the law requires or its acts will be void. In 1889 the time for the meeting was the third Monday in June.

SAME.—*Assessment of Mining Corporations by Board of Equalization.*—*Notice of Meeting.*—Under the tax law of 1881, no special notice of the time of the meeting of the board of equalization is required to be given to a mining corporation, for the purpose of assessing its property rights, where such corporation has made and delivered to the proper officer a schedule of its property for appraisement and taxation. Such a corporation is bound to take notice of the time and place of the meeting of such board.

128	335
129	68
128	335
131	152
133	537
133	649
128	335
135	597
128	335
140	348
141	161
138	335
144	377
128	335
150	221
128	335
159	185
128	335
163	604
128	335
168	366

Hyland, Auditor, *et al.* v. The Brazil Block Coal Company.

SAME.—Assessing Capital Stock of Mining Corporation.—Where all the tangible property of a mining corporation is duly returned for taxation, and it represents the entire capital of the corporation, the capital stock could not be assessed for taxation under the tax law of 1881 and its amendments.

SAME.—Tender of Amount Due.—Injunction.—Assessment of Capital Stock.—In a proceeding to enjoin the collection of a tax assessed upon the capital stock of a mining corporation, it is not necessary to first make a tender of the amount of tax due upon its tangible property, where such property is fully returned and fairly valued.

SAME.—Power of Board of Equalization.—The board of equalization can not make property of any kind subject to assessment for taxation if there is no statute conferring that authority upon it.

STATUTE.—Re-Enactment.—Effect.—The re-enactment of a statute makes the statute as re-enacted the law of the State.

From the Clay Circuit Court.

W. B. Schwartz, J. A. McNutt and H. Teter, for appellants.

G. A. Knight and A. W. Knight, for appellee.

ELLIOTT, J.—The complaint of the appellee alleges that it is a mining corporation organized under the laws of this State; that its nominal capital stock is \$619,300; that on the 1st day of April, 1889, its entire capital was invested in real and personal property in the counties of Clay, Owen and Parke; that it had no surplus capital or accumulations of any kind; that on the day named its capital stock had neither a market value nor an actual value over and above that of its tangible property; that its entire capital stock was represented by its tangible property, and was of no greater value than that property; that it listed for taxation all of its personal property, rights, credits, money and effects in the counties named, and in the several townships therein; that all of its personal property was appraised at its fair cash value; that, in addition to listing its tangible personal property, it made out and delivered to the assessor of the township, wherein its principal office was located, a sworn statement of its capital stock, as required by section 6357, R. S. 1881; that in such sworn statement it fixed the value

Hyland, Auditor, *et al.* v. The Brazil Block Coal Company.

of its capital stock at that of its tangible property ; that on the 1st day of April, 1889, it owned no property of any kind except such as it listed and returned for taxation ; that the total value of all of its property was \$140,042, and that this sum represented the actual value of its capital stock ; that on the 17th day of June, 1889, a board of equalization convened at the court house in the city of Brazil, and on the 5th day of its session it assumed to assess and did assess the capital stock of the appellee at the value of fifty per cent. on its face value ; that such assessment fixed the total value of appellee's capital stock at \$309,650 ; that the board ordered that from the total value so fixed upon the capital stock the tangible property of the appellee, \$140,042, should be deducted, and that the board also directed that the difference between the sums named, \$169, 608, should be added to the property of the appellee for taxation. It is charged that the proceedings of the board of equalization were illegal for the following reasons :

"1st. That by so assessing the capital stock and adding \$169,608 to the assessed value of the plaintiff's other and tangible property already upon the tax duplicate, the pretended board of equalization has unlawfully imposed upon the plaintiff a double tax on the same property owned and held by the plaintiff on the 1st day of April, 1889.

"2d. That by the illegal action of the pretended board the property of the plaintiff is taxed unlawfully at a greater rate than is assessed upon private individuals.

"3d. That said additional sum and increased assessment is not equal and uniform taxation, and imposes upon the plaintiff the injustice and burden of paying a twofold or double tax upon the same property.

"4th. That the pretended board of equalization 'illegally, wrongfully and without jurisdiction,' made such assessment and did not in any manner give plaintiff any notice whatever of such proposed action, nor did it cause, as the law

Hyland, Auditor, *et al.* v. The Brazil Block Coal Company.

directs, a written notice to be issued by the auditor as the law requires, nor was any notice of any kind given, issued or published in any newspaper of the proposed action of the board."

It is further alleged that the board of equalization was illegally convened and organized for the reasons:

"1st. That it did not meet on the 1st Monday in June, 1889, as required by law, but did meet on the 3d Monday in June, 1889, in violation of law.

"2d. That no notice was given by the auditor of Clay county, and published, or posted two weeks before the 1st Monday in June, 1889, of the meeting of the board of equalization.

"3d. That the orders, acts and assessments of the board were made and performed after the expiration of fifteen days from the 1st Monday of June, 1889, and after the time limited by law had expired within which the board could legally act."

Section 129 of the act of 1881 (Acts 1881, p. 656) provides for the formation and duties of a county board of equalization, and declares that it shall meet annually on the third Monday of June. It also provides that two weeks' notice of the time of meeting shall be given by publication. Section 6397, R. S. 1881. Section 1 of an act of the same year provides that "After the present year the county board of equalization shall meet, * * on the first Monday of June, annually." Section 6398, R. S. 1881. The act first mentioned was passed on the 29th day of March, 1881, and that last mentioned on the 16th day of April of the same year. Both took effect immediately. On the 9th day of March, 1889 (Acts 1889, p. 367), an act was passed amending section 129 of March 29, 1881, and in this latter act the time for the meeting of the board of equalization was named as the third Monday in June of each year. Elliott's Supp., section 2127. This was done by incorporating the language

Hyland, Auditor, *et al.* v. The Brazil Block Coal Company.

of section 129 of the act of March 29th, 1881, in the later act.

The question which comes first in natural order is whether the board of equalization met on the day fixed by law, for if the session held in June, 1889, was not held at the time designated by law, the proceedings of the board were ineffective. Such a tribunal must meet and organize as the law requires. *State, ex rel., v. McGinnis*, 34 Ind. 452; *Shoemaker v. Board, etc.*, 36 Ind. 175.

Whether the meeting on the third Monday in June, 1889, was legal must depend upon the effect of the act of March 9th, 1889. That act is unquestionably valid, for section 129 of the act of March 29th, 1881, had not been amended. It stood on the statute book as an act subject to amendment, for the act of April 16th, 1881, did not profess to amend it. Counsel do not contend, although the case has been very fully and ably argued, that the act of 1889 is invalid, nor could such a contention be even plausibly maintained, for the act of March 29th, 1881, had not been previously amended. If affected at all it was in part repealed by an independent statute. The question, therefore, is what is the effect of the re-enactment of section 129 of the act of March, 1881?

There can, of course, be no doubt that counsel are right in their position that the legislative intention must govern, but that intention must be found in the statute. Nor can there be any doubt that 'repeals by implication are not favored. Neither can there be any doubt that, where there is a manifest repugnancy between the earlier and later statutes, the earlier must be deemed to be repealed. If, therefore, there is an irreconcilable conflict between the act of 1889 and that of April, 1881, the last named act must be deemed to be repealed.

There is a direct repugnancy between the two acts, for it is impossible to reconcile their provisions; one or the other must give way, and, under the settled rule, it must be the

Hyland, Auditor, *et al.* v. The Brazil Block Coal Company.

earlier. By incorporating the language of section 129 of the act of March 29th, 1881, in the amendatory act of 1889, the former statute was re-enacted. The re-enactment of a statute makes the statute as re-enacted the law of the State. *Sage v. State*, 127 Ind. 15; *Mayne v. Board, etc.*, 123 Ind. 132. It is impossible to escape the conclusion that the act of 1889 fixes the time for the meeting of county boards of equalization, and hence it must be held that the board convened at the proper time.

The next question is whether the appellee was entitled to notice in addition to that given of the time of the meeting of the board. It can not be doubted that some notice must be provided for by law, since there can be no due process of law where there is no notice. *Kuntz v. Sumption*, 117 Ind. 1. If, however, notice is provided, and it is of such a character as to inform the taxpayer that his lists will be revised, and to give him a reasonable opportunity to be heard, the constitutional requirement is met. We think there was such notice in this case. The time for the meeting of the board is fixed by law, so that all interested must take notice. The duties of the board are, also, fixed by law, so that all are bound to know what those duties are. Notice of the time of the meeting was given as the law directs. Section 89 of the act of 1881 requires mining corporations to deliver to the assessor a sworn statement and schedule, and provides that the statement and schedule shall be laid before the county board of equalization. It is also provided that the board shall "value and assess the capital stock in the manner provided in this act." Section 6357, R. S. 1881.

It is evident that the appellee could not be ignorant of the fact that its property would be valued and assessed by the board of equalization, for a public law made it the duty of the appellee to furnish a statement for consideration by the board, and also made it the duty of the board to make the assessment. The case is entirely unlike that of an individual taxpayer, for he can not know that the board will take any

Hyland, Auditor, et al. v. The Brazil Block Coal Company.

action upon his list, whereas the corporation knows, as matter of law, that the board will act upon its statement, since that is the principal purpose for which the sworn statement is required. It is manifest that neither the principle decided in *Kuntz v. Sumption*, *supra*, nor the line of reasoning there pursued, is relevant to the question here presented. As the statement furnished by the corporation presents the matter to the board for action, and the corporation knows that the board must act upon it, there is no valid reason for asserting that there was no notice. The act of 1889 can not be considered as an independent law, standing apart from all other statutes; on the contrary, it must be considered as part of one great body of law. *Humphries v. Davis*, 100 Ind. 274; *Rushville, etc., Co. v. City of Rushville*, 121 Ind. 206 (213), and cases cited. When thus considered, it is quite clear that the term "person," as there used, does not mean corporations that are required by statute to file sworn statements and schedules to be laid before the board of equalization. It is, indeed, far from true that the term "persons" always embraces corporations.

The question we next encounter is whether the board of equalization had authority to assess the capital stock in the manner it did. It will be observed that section 89 provides that the assessment of the capital stock shall be made "in the manner provided in the act." Section 6357, R. S. 1881. This measures and defines the authority of the board, since its sole authority is to assess in the manner prescribed by the statute. It is necessary, therefore, to ascertain whether the statute authorizes the capital stock of mining corporations to be assessed in cases where tangible property is duly returned for taxation and represents the entire capital of the corporation. Our statute contains these provisions:

Sec. 36. "The property of incorporated companies shall not be listed and assessed at a greater rate than such prop-

Hyland, Auditor, *et al.* v. The Brazil Black Coal Company.

erty would be if it were the property of private individuals or firms."

Sec. 39. "In all cases where the *tangible property or the capital stock* of any incorporated company is listed and assessed under this act, the shares of capital stock of such incorporated companies shall not be listed and assessed." Sections 6305, 6308, R. S. 1881.

It seems clear to us that the statute prohibits the assessment of the capital stock where the entire capital is invested in tangible property which is duly listed and returned for taxation. We are not here concerned with any question as to what the Legislature has power to do, for the question here is as to the meaning and effect of a statute. Nor are we concerned with any question as to the proper basis of assessment where the capital of the corporation is not invested in tangible property or where the capital stock has some value over and above that property, for in this instance the entire capital is invested in, and represented by, the property duly listed for taxation.

The authorities which declare that where part of a tax is due that part must be tendered, do not apply to this case, for here no tax whatever is due upon the capital stock. The plaintiff does not seek to defeat a part of an assessment, but it seeks to prevent the levy of an assessment upon property not subject to taxation. The statute does not, as we have seen, authorize the assessment of the capital stock, and, as there is no property subject to taxation, there can be no part of an assessment which the appellee is bound to pay. While we approve to the fullest extent the doctrine of such cases as *City of Logansport v. Case*, 124 Ind. 254, and *Morrison v. Jacoby*, 114 Ind. 84, we deny its applicability to a case like this, where an attempt is made to assess property which is not subject to taxation. If the appellee were seeking to avoid part of the assessment levied upon its tangible property, the cases to which we have referred would be

Hyland, Auditor, *et al.* v. The Brazil Block Coal Company.

of controlling influence, but that is not what it is seeking to do.

There is no question before us as to what the rule would be in a case where the tangible property of a corporation is not fairly valued, for the complaint avers that it was fairly valued, and that the value placed upon it was accepted as correct by the board of equalization.

As it is made to appear by the allegations of the complaint that the capital stock did not exceed in value the tangible property returned for taxation, there is no question as to the effect of the finding of the board of equalization; for the question is whether the board can assess property which, by law, is not subject to taxation. If the property,—that is, the capital stock,—had been subject to taxation, then the question as to whether the value placed upon it by the board is final and conclusive would be presented, but as the confessed allegations show that the capital stock was not subject to taxation the board had no authority over it, since it is clear that the board can not make property of any kind subject to assessment where there is no statute conferring that authority upon it.

The question whether an assessment may be levied upon capital stock to the extent to which it exceeds in value the tangible property is not presented by the complaint, nor is the question whether corporate franchises may be taxed where they have a value over and above the tangible property and the capital stock, presented for our decision. It is evident that no provision of the statute confers authority to tax the capital stock where the whole value of the stock is in the tangible property, and it is very doubtful whether it could be done under the Constitution. Section 21 of the act of March 29th, 1881, section 6290, R. S. 1881, simply provides at what place capital stock shall be assessed. Section 89, as we have seen, does not provide for the assessment of capital stock where the whole value of the stock is in the tangible property, and section 91 is merely auxiliary to section 89 of

Luzader v. Richmond *et al.*

the same act. Sections 6357-6359, R. S. 1881. While it may not be double taxation to tax capital stock to the extent that it exceeds in value the tangible property, it certainly can not be doubted that it can not be assessed where there is no statute authorizing its assessment.

We have been unable to find any copy of an entry or recital showing the filing of a bill of exceptions, so that we can not consider questions arising upon the motion denying a new trial.

Judgment affirmed.

COFFEY, J., did not take any part in the decision of this case.

Filed Jan. 31, 1891; petition for a rehearing overruled May 22, 1891.

No. 15,121.

128 344
141 168

LUZADER v. RICHMOND ET AL.

SPECIFIC PERFORMANCE.—*Statute of Frauds.*—*Burden to Show Contract Taken Out of the Statute.*—The party who seeks to enforce a specific performance of a contract to convey real estate has the burden to show that such things had been done as took the contract out of the statute of frauds.

SAME.—*Complaint.*—*Delivery of Deed to Third Person.*—*Conditions.*—In a complaint for specific performance of a contract to convey land, where the plaintiff alleges a full compliance with its terms on his part, and shows that the vendor delivered the deed to a third person to be delivered to the plaintiff pursuant to the contract, but fails to allege whether or not the delivery was conditional, it is insufficient on demurrer.

From the Sullivan Circuit Court.

W. S. Maple, for appellant.

J. T. Hays and H. J. Hays, for appellees.

COFFEY, J.—This was an action by the appellant against

Luzader v. Richmond et al.

the appellees, in the Sullivan Circuit Court, to enforce the specific performance of a contract to convey real estate.

The court sustained a demurrer to the complaint, and the correctness of this ruling presents the only question for our consideration.

The complaint alleges that on the 10th day of March, 1889, the appellees were the owners in fee simple of the land in controversy; that on that day the appellant purchased the land from the appellees, at the agreed price of seven hundred dollars, five hundred dollars of which sum was to be paid in cash, and two hundred dollars in notes secured by appellee's lien upon the land; that on the 23d day of March, 1889, W. H. Snyder, a justice of the peace, notified the appellant that the appellees had executed to him a deed for said land in pursuance of said contract, and had left the same with said justice to be delivered to the appellant; that in fact said deed was so left with Snyder to be delivered by him to the appellant pursuant to said contract and purchase; that the appellant at once executed his note for two hundred dollars, secured by mortgage on said land, and delivered them to the appellees, who accepted the same; that he tendered to appellees five hundred dollars in money; that after said notes and mortgage had been accepted, and said money tendered, the appellant demanded said deed from Snyder, in pursuance of said purchase, but said Snyder refused to deliver the same, and thereafter, without the knowledge or consent of the appellant, returned the deed to the appellees.

Prayer that appellees be required to deliver the deed to the appellant, and that they be required to comply with the terms of the contract.

It is contended by the appellant that the delivery of the deed to Snyder vested in him the title to the land therein described, and that by reason of such fact the case was taken out of the statute of frauds.

It is conceded by both parties to this controversy that un-

Luzader v. Richmond et al.

less the delivery of the deed to Snyder vested the title in the appellant, the case is within the statute of frauds, and that the appellant can not succeed in this action. The case of *Freeland v. Charnley*, 80 Ind. 132, is relied on by both parties to this suit, and, as held in that case, the question is as to whether the deed was unconditionally delivered, so that it passed from the control of the appellees, or as to whether it was delivered as an escrow.

The contract between the parties is not very fully or minutely stated in the complaint, and we are left in some doubt as to its exact terms. It is assumed by the appellant in argument that the complaint alleges there was an agreement between the appellant and the appellees that the deed was to be left with Snyder for the use of the appellant, but no such direct allegation is found in the complaint. If such agreement was made, we are also left in ignorance as to whether such agreement was coupled with any conditions, or as to whether it was free from conditions, though it is assumed by the appellant, without allegations in the complaint, that the delivery of the deed to Snyder was unconditional.

If the deed was delivered to Snyder coupled with a condition, no title passed thereby until the condition had been performed and the deed delivered to the appellant.

In the case of *Freeland v. Charnley*, *supra*, it was said by this court: "A deed placed in the hands of a third person for the grantee is at once operative, provided, always, that the grantor intends it as a delivery and parts with all control. But, to constitute such an act a delivery, it must appear that the grantor placed it in the hands of the third person for the grantee, and that it was not accompanied by any condition. 4 Kent Com. 455; *Stewart v. Weed*, 11 Ind. 92."

As we have seen, it is not alleged in the complaint in this cause that the delivery of the deed to Snyder was not accompanied by a condition, while the law implies, under the contract set out in the complaint, that the delivery of the

The Louisville, New Albany and Chicago Railway Company v. Wolfe.

deed and payment of the purchase-money were to be contemporaneous acts.

The burden was upon the appellant to show, as the contract was within the statute of frauds, that such things had been done as took the case out of the statute. To do so in this case it was necessary to allege such facts as made it appear that the delivery of the deed to Snyder was done under such circumstances as vested the title in the appellant. This we are of the opinion is not done, and for this reason the complaint is not sufficient to withstand a demurrer.

The complaint is, perhaps, defective in other respects, but as it is defective in the particular indicated, the court did not err in sustaining a demurrer thereto.

Judgment affirmed.

Filed May 23, 1891.

No. 14,832.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. WOLFE.

COMMON CARRIER.—*Falsely Charging Passenger Concerning Payment of His Fare.*—*Misconduct of Passenger in Heat of Passion.*—*Ejecting.*—A railroad company can not justify the act of its conductor in expelling a passenger, who has paid his fare, on account of his having, in the heat of passion, when he was falsely charged with the failure to pay, used improper language, such as swearing in the presence of female and other passengers in a loud tone of voice.

SAME.—*Ejecting Passenger.*—*Damages Occasioned by Passenger Resisting.*—A passenger lawfully in a car, who is illegally and wrongfully ejected, may recover for the damages occasioned to his person by his making a reasonable resistance to prevent his removal.

DAMAGES.—*When Exemplary May be Given.*—Exemplary damages may be given when malice and oppression weigh in the controversy, and the act is not punishable as a crime.

From the Harrison Circuit Court.

The Louisville, New Albany and Chicago Railway Company v. Wolfe.

C. L. Jewett, H. E. Jewett, E. C. Field, D. J. Wile and S. O. Pickens, for appellant.

A. Dowling, for appellee.

OLDS, C. J.—This is an action by the appellee against the appellant for being wrongfully expelled from the appellant's train by its servants, with force and violence, under humiliating circumstances. Issues were joined on the complaint by a general denial and answers in justification, one alleging the non-payment of fare, and the other non-payment of fare and the use of profane and indecent language, and that he was guilty of disorderly conduct. The appellee replied in denial to the answers in justification. There was a trial by jury, and a verdict in favor of the appellee for \$1,500 damages. The jury also returned answers to special interrogatories. Appellant moved for judgment on the interrogatories and answers, also for a new trial, and to modify the judgment, all of which motions were overruled, and judgment rendered on the verdict.

Appellant's counsel discuss three propositions:

First. That appellee by his conduct and language forfeited his right to be carried as a passenger, and appellant had the lawful right to eject him from the train.

Second. That the damages are excessive, and

Third. That the court erred in the instruction given in relation to damages.

The jury, by their answers to interrogatories, find that appellee, on August 29th, 1887, purchased a ticket at New Albany for passage on appellant's train from New Albany to Mitchell, Indiana, and on said day he took passage on appellant's train for Mitchell, and on demand of the conductor surrendered his ticket; that the conductor demanded fare or a ticket twice before stopping the train to put appellee off, and the train was stopped, not at a regular station or stopping place, to put him off; that the train was stopped before any effort was made to eject appellee, and before he was put off

The Louisville, New Albany and Chicago Railway Company v. Wolfe.

the train he said to the conductor: "If you say I did not give you a ticket you are a God-damned lying son-of-a-bitch;" that the words were spoken in a loud voice, and there were ladies in the car at the time; that when the trainmen undertook to put the appellee off the train he resisted and struggled and attempted to hold on to the seats in the car, and while so resisting he was injured about the arms and hands, and this was all the physical injuries he received.

It is insisted that these facts entitled the appellant to a judgment, notwithstanding the general verdict, on the theory that the appellee by the use of the profane and improper language in a loud tone in the presence of the lady passengers, forfeited his right to be carried as a passenger, and the conductor had the right to stop the train and put him off. It is assumed in the argument that this finding of facts shows the appellee to have used this improper language before the train was stopped for the purpose of putting him off, but this assumption is not warranted by the finding. The finding is that he used this language "just before he was put off of defendant's train."

We do not think it presents the proposition discussed by counsel, viz., that if a passenger delivers to a conductor a ticket, or pays his fare, and afterwards the conductor calls upon him to again pay his fare, and disputes the first payment, and a dispute arises in which the conductor demands fare and the passenger refuses to pay it on the ground that he has once paid, but in his refusal he becomes boisterous and is guilty of unbecoming conduct, or the use of vulgar, obscene and profane language, he forfeits his right to be carried further, notwithstanding he has paid his fare; and the conductor may stop the train and expel him without liability. For aught that appears in the finding in this case, the appellee may have conducted himself in a perfectly civil and gentlemanly manner until the train was stopped, and the employees of the appellant had taken hold of him

The Louisville, New Albany and Chicago Railway Company v. Wolfe.

and a struggle ensued, and the appellee taken from his seat, and that it was just as he was about to be finally ejected from the car when he used the language. If such were the facts,—and they may have been for aught that appears from the finding,—it would present a very different case than if the language was used in the first instance; for in such a case as we have put it would be clear that the language used had nothing to do with the ejection from the train. It would be clearly apparent, under such a state of facts, that he would have been ejected without regard to the use of the language. But, conceding that the language was used before the train was stopped, it does not appear that he was ejected on account of the vile language used. It is undoubtedly true that a passenger by a breach of decorum, either by his acts or his language, may forfeit his right to be carried as a passenger, and may be expelled from the train notwithstanding he has paid his fare, and this may be true even if he be led to such breach by reason of an insult offered him by an employee of the company.

A wanton insult or false accusation often causes a sudden outburst of temper and the use of language which one in an instant after regrets, and feels the mortification more keenly than do those in whose presence it is uttered. One who utters language in a heat of passion caused by a sudden and wanton insult and unexpected charge against his truthfulness and honesty, must be dealt with more leniently than if the language is used deliberately, without provocation, or after reasonable time for second thought and opportunity to bridle and control his passion. The fact that a false and slanderous charge is made in the heat of passion may be proven in mitigation of damages. If a conductor, after having received a ticket for fare from a passenger should return to him and falsely deny having collected his fare or received a ticket, and demand pay again, and it is refused, and the conductor should abandon any further effort to collect again the fare or refrain from making any threats of putting him off the

The Louisville, New Albany and Chicago Railway Company v. Wolfe.

train, and the passenger, after having reasonable time to control himself, should persist in the use of profane or indecent language, to the annoyance of other passengers, he would no doubt violate his right to be carried, at least if the unearned fare was tendered back to him. But the company can not justify the act of the conductor in expelling a passenger, who has paid his fare, on account of his having in the heat of passion, when he was falsely charged with the failure to pay, used improper language such as was used in this case in response to such false charge, even though it was heard by other passengers. The wrong committed by the passenger was provoked by the conductor. It does not lie in the mouth of the appellant to say: "True, you paid your fare. You had the right to be carried. But when the conductor falsely charged you, in the presence of the other passengers, with not having paid your fare, and demanded that you again pay fare or he would stop the train and put you off, you became angry; you used improper language to the conductor in the presence of lady passengers." If the theory contended for by the appellant be the true one, then it would be an inducement for the employees of railroad companies, under such circumstances, to wantonly and purposely address the passenger in such a manner as to provoke him to the use of bad language or bad conduct, as affording an excuse in case he refused to pay a second time to eject him from the train. The damages sued for accrued on account of an injury on the part of the employee of the appellant to the appellee. The offence committed by the appellee is against the other passengers. He was provoked to the commission of it by the act of the employee of the appellant in falsely accusing him, in the presence of the other passengers, of not having paid his fare. Certainly the company ought not to defend against the unlawful act of their agent on account of such unlawful act having provoked a breach of decorum, or even a breach of the peace on the part of the appellee.

The Louisville, New Albany and Chicago Railway Company v. Wolfe.

It is true the language used was unjustifiable, and was an insult to those in whose presence it was uttered, but it is evidently the fact that this breach of decorum was provoked and caused by an insult offered by the conductor to the appellee in the presence of the passengers, and we see no just reason why, under such circumstances, it should operate as a defence to appellee's right of action, and bar him from a recovery.

It is next contended that the verdict is excessive, for the reason that the jury found that all the physical injuries inflicted were caused by the appellee resisting, and that he can not recover for an injury caused by his resistance. There is nothing to show that the jury did include any damages for the injury occurring by reason of appellee's resistance, but the appellee being lawfully in the car, and having paid his fare, he had the right to be carried, and had the right to make reasonable resistance, as he did, by holding on to the seats, and he was forced loose and taken from the car; and for such damages as he sustained on account of such removal from the car the appellant is liable. *English v. Delaware, etc., Canal Co.*, 66 N. Y. 454; *Southern Kansas, etc., R. W. Co. v. Rice*, 38 Kansas, 398; *Lake Erie, etc., R. W. Co. v. Acres*, 108 Ind. 548; *Chicago, etc., R. R. Co. v. Holdridge*, 118 Ind. 281.

Some objection is made to the giving of the seventh instruction, and the refusal to give instruction seventh asked by appellant. We have examined these instructions, and think there is no available error in the instruction given. It is evident the jury was not misled by any technical error in the language used, even if it is erroneous. The instruction relates to the right to give exemplary damages, and there was some evidence which, if true, authorized the assessment of exemplary damages. *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116. Where the offence is not punishable by the criminal law, and malice or oppression weigh in the controversy, exemplary or vindictive damages may be as-

Hormann *et al.* v. Hartmetz.

sessed. What we have said as to the other alleged errors disposes of the question presented by the instruction refused.

It is further contended that a new trial should have been granted by reason of accident and surprise on account of an absent witness. There is no diligence shown; no application for a continuance, and the evidence is merely cumulative.

There is no error in the record.

Judgment affirmed at costs of appellant.

Filed May 23, 1891.

No. 15,128.

HORMANN ET AL. v. HARTMETZ.

MORTGAGE.—*Payment of Prior Encumbrance.*—*Tender.*—Where a husband and wife executed a mortgage on certain real estate, to secure a loan, and a portion of the money borrowed was applied to the payment of prior encumbrances on the mortgaged premises, they can not defeat the enforcement of the mortgage, though a part of the mortgage debt is not enforceable, when there has been no return or tender of the amount paid to discharge the prior encumbrances.

PRACTICE.—*Demurrer.*—*Sustaining of.*—*When No Available Error.*—*Complaint.*—Where a demurrer is sustained to one paragraph of a complaint, and additional paragraphs are subsequently filed, alleging substantially the same facts, and requiring no more evidence than the one held bad, the ruling on the demurrer is not available. *Summers v. Tarnney*, 123 Ind. 560, distinguished.

SAME.—*Bill of Exceptions.*—*What Record Must Show as to Filing.*—Unless the record affirmatively shows that a bill of exceptions has been filed, there is no bill in the record. Section 629, R. S. 1881.

SAME.—*Bill of Exceptions.*—*Date of Presentation.*—*Must Appear in Bill.*—The date of the presentation of a bill of exceptions must be stated in the bill itself. It is not sufficient to endorse the time upon the bill.

SAME.—*Appeal.*—*Objections to a Judgment, or Decree.*—*When Must be First Made.*—Objections to a judgment, or decree, can not be successfully made, for the first time, on appeal. Specific objections must be pre-

VOL. 128.—23

128	353
131	420
128	353
140	353
142	473
128	353
145	217
147	303
147	516
128	353
150	655
128	353
153	196
153	610
128	353
154	362
128	353
157	396

Hormann et al. v. Hartmetz.

sent to the trial court, and so presented as to direct attention to the defects, or errors, and enable the trial court to review them, and, if need be, to correct them.

From the Vanderburgh Circuit Court.

C. B. Harris and J. T. Walker, for appellants.

S. R. Hornbrook, for appellee.

ELLIOTT, J.—A demurrer was sustained to the third paragraph of the appellants' complaint, and upon this ruling is based one of the specifications of error. But as the appellants subsequently filed additional paragraphs, alleging substantially the same facts as those pleaded in the paragraph held bad, and requiring no more evidence to support them, the error, if it was one, was harmless. Where a demurrer is sustained to one paragraph of a complaint, and additional paragraphs are subsequently filed, alleging substantially the same facts, and requiring no more evidence than the one held bad, the ruling on the demurrer is not available. *Hunter v. Pfeiffer*, 108 Ind. 197, and cases cited. We do not mean to trench upon the long established rule that a plaintiff may state his cause of action in different forms, nor do we do so, for we hold that where there is an amendment the amended pleading is superseded, and that where the paragraphs which remain entitle the plaintiff to give the same evidence as that admissible under the paragraph adjudged bad, and require no greater evidence, an erroneous ruling on the demurrer is not a prejudicial error. *Long v. Williams*, 74 Ind. 115; *City of Elkhart v. Wickwire*, 87 Ind. 77. Where, however, a paragraph of a complaint is erroneously adjudged insufficient, and others are held good, the error is not harmless if the paragraphs allowed to stand are substantially different from that held bad, or if those held good impose upon the plaintiff the burden of adducing stronger or greater evidence than would be necessary under the paragraph condemned. If, in other words, the effect of the ruling on demurrer is to make it necessary to introduce more or greater evidence, or to ex-

Hormann *et al.* v. Hartmetz.

clude competent evidence, the error may be prejudicial, but it is otherwise where the ruling on demurrer does not have the effect either to abridge the right of the plaintiff or to increase his burden.

The decision in *Summers v. Tarney*, 123 Ind. 560, does not, when justly interpreted, declare any doctrine opposed to our conclusion, for all that is there decided is that where two paragraphs of a complaint allege the same facts, it is not prejudicial error to overrule a demurrer to one of them. That case can not, however, be construed as asserting that a defendant would not be prejudiced if a bad paragraph was held good where such a ruling would enable the plaintiff to recover upon insufficient evidence. The principle involved in such a case is the same as that involved in such cases as *Messick v. Midland R. W. Co.*, *ante*, p. 81, and *Over v. Shannon*, 75 Ind. 352.

In a case where a demurrer to one paragraph is overruled and there is another paragraph stating the same facts as the paragraph assailed, but stating additional facts, it would be prejudicial error to hold the assailed paragraph sufficient, if, in fact, it is bad on demurrer. If, to somewhat vary the statement, a complaint contains two paragraphs, and one of them states only a part of the facts essential to a recovery, and the other states the same facts, but also states the other facts essential to a cause of action, it would not be a harmless error to overrule a demurrer to the paragraph stating part only of the facts essential to the existence of a right of action. Of course, other parts of the record might show a ruling in such a case to be harmless, but unless other parts of the record should show this, the error could not be regarded as a harmless one. Many cases affirm this doctrine, but we do not deem it necessary to cite them.

The facts, as they appear in the special finding, are, in substance, these: The plaintiffs, here the appellants, are husband and wife, and have been since the year 1875. Prior to August 22d, 1885, Hiram E. Read owned the real estate in-

Hormann et al. v. Hartmetz.

volved in the controversy, and on that day he conveyed it to the plaintiffs jointly. About the time of the purchase of the real estate the husband contracted for the erection of a dwelling-house thereon, for which he agreed to pay, and did pay, six hundred dollars. In November, 1884, the plaintiffs executed a mortgage to August Matt, and obtained from him three hundred and fifty dollars, which was used in paying for the house erected on the land of the plaintiffs. On the 26th day of February, 1885, the plaintiffs executed to the Franklin Building Association a mortgage to secure a loan of three hundred and ninety dollars, and they represented to the officers of the association that the money was to be used in discharging liens upon the property, and for improving it. On these representations the association relied. Of the money borrowed from the association, the sum of three hundred and fifty-five dollars was used to pay the mortgage executed to August Matt; the sum of ten dollars was used to pay expenses incurred in securing the loan, and there is no evidence as to the use made of the residue. On the 6th day of August, 1885, the plaintiffs conveyed the property to Herman Thole without consideration, and on the same day obtained from the building association another loan, and executed a mortgage for one hundred and thirty dollars. The association knew that the money obtained was to be used by the husband in his own business, and the money was so used. On the 28th day of April, 1886, the husband obtained from one Klein a loan of two hundred dollars, for which a mortgage was executed by the husband and wife. On the 29th day of July, 1887, the plaintiffs joined in a mortgage to Solomon Bartholme for four hundred dollars, and the husband represented to Bartholme that Thole had re-conveyed to him and his wife, but this representation was not true. In June, 1887, the husband applied to Hartmetz, the appellee, for a loan, representing that he was the owner of the property; that he was about to engage in the saloon business, and would need more capital than he had. Hartmetz acceded to the hus-

Hormann et al. v. Hartmetz.

band's request, and loaned him one hundred dollars, and agreed to lend him additional sums from time to time. Subsequently the husband obtained divers sums of money, aggregating three hundred and ten dollars. The appellants, after obtaining the loan from the appellee, informed him that the property was encumbered by prior mortgages, and of their desire to have him pay the encumbrances, and requested him to pay the encumbrances and take a mortgage. To this request the appellee acceded. Pursuant to the agreement the appellee did pay the prior encumbrances, amounting in the aggregate to five hundred and sixty dollars. The appellants executed the mortgage involved in this suit to secure the appellee the amount paid by him in discharging prior encumbrances and the loan made to the husband. During the course of the negotiations the appellants represented to the appellees that they jointly owned the mortgaged property, and at the time of executing the mortgage they conveyed it to Peter Aschoff as trustee, who immediately re-conveyed to the husband, Herman Hormann. The promissory note evidencing the amount due the appellee was executed by the husband alone. The real estate was bought with the husband's money.

On the facts thus found the court declared, as a conclusion of law, that the appellants were not entitled to a decree cancelling the mortgage executed by them to the appellee.

There was no error in the conclusion of law stated by the court. If it were conceded that part of the sum secured by the mortgage executed by the appellants to the appellee was not enforceable against the mortgagors, still the suit to cancel the mortgage must fail, for the appellants can not have equity without doing equity. Equity requires that there should at least be a payment or tender of the amount paid to discharge prior encumbrances. This proposition is too plain to justify elaboration.

The appellee contends that, as the record does not show the filing of a bill of exceptions, there is no bill in the record.

Hormann *et al.* v. Hartmetz.

The contention that the bill must be filed, and that the record should show its filing, must prevail. The statute expressly requires that the bill shall be filed. Section 629, R. S. 1881. Until filed it is not part of the record, and unless the filing is affirmatively shown by the proper record, there is no evidence of the fact upon which the appellate tribunal can act. *Pratt v. Allen*, 95 Ind. 404; *Loy v. Loy*, 90 Ind. 404; *Hull v. Louth*, 109 Ind. 315; *Hessian v. State*, 116 Ind. 58.

Another objection urged by the appellee is that the date of the presentation of the bill of exceptions does not appear in the bill, but appears by endorsement. The statute requires that the time of presenting the bill shall be stated in the bill itself, and under this provision it has been repeatedly held that it is not sufficient to endorse the time upon the bill. *McCoy v. State, ex rel.*, 121 Ind. 160; *Buchart v. Burger*, 115 Ind. 123; *Orton v. Tilden*, 110 Ind. 131.

As there is some confusion in the record regarding the filing of the bill of exceptions, we have examined the evidence, and find that it fully supports the judgment of the trial court.

Objections to a judgment, or decree, can not be successfully made, for the first time, on appeal. The groundwork must invariably be laid in the trial court by specific objections presented by a motion to modify, or in some other appropriate method. It is a principle of procedure, of wide sweep, that specific objections must be presented to the trial court, and so presented as to direct attention to the defects, or errors, and enable the trial court to review them, and, if need be, to correct them. *Ludlow v. Walker*, 67 Ind. 353; *Merritt v. Pearson*, 76 Ind. 44; *Scotton v. Mann*, 89 Ind. 404; *Stout v. Curry*, 110 Ind. 514; *Benefiel v. Aughe*, 93 Ind. 401; *City of Greenfield v. State, ex rel.*, 113 Ind. 597; *Buchanan v. Berkshire, etc., Ins. Co.*, 96 Ind. 510; *Mansfield v. Shipp*, *ante*, p. 55.

Judgment affirmed.

Filed May 23, 1891.

Orr *et al.* v. Cravens *et al.*

No. 15,866.

WILLS ET AL. v. THE STATE, EX REL. HUGHES.

128	350
139	590

From the Hendricks Circuit Court.

T. J. Cofer, C. C. Hadley, J. S. Duncan and C. W. Smith, for appellants.*J. A. Downard, J. O. Parker and A. C. Ayres*, for appellee.

MILLER, J.—This was a proceeding to obtain a mandate against the members of a board of judges of an election held in Middle township of Hendricks county.

It appears that the relator Hughes and one Hornaday were the rival and only candidates voted for at the election for the office of township trustee, and that they received an equal number of votes for the office. The judges failed and refused to determine by lot the person entitled to the office, but certified the result as a tie vote and adjourned.

The only question presented is whether a board of judges having adjourned without completing their duties as such board can be compelled by mandate to re-assemble and complete the duties devolved upon them by law.

This question so fully and elaborately discussed by counsel was decided adversely to the appellants in the case of *Johnston v. State, ex rel.*, ante, p. 16.

For the reasons given in the opinion in the case referred to the judgment rendered in this case is affirmed, with costs.

Filed April 11, 1891.

No. 14,931.

ORR ET AL. v. CRAVENS ET AL.

From the Jackson Circuit Court.

W. K. Marshall, for appellants.*J. M. Lewis and B. H. Burrell*, for appellees.

MILLER, J.—The question involved in this appeal is the same question that was involved and decided in *Orr v. Owens*, ante, p. 229. For the reasons given in the opinion in that case this case is affirmed, with costs.

Filed May 1, 1891.

END OF NOVEMBER TERM, 1890.

C A S E S
ARGUED AND DETERMINED
 IN THE
SUPREME COURT OF JUDICATURE
 OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1891, IN THE SEVENTY-FIFTH
YEAR OF THE STATE.

128	360
139	170
128	360
141	579

No. 15,005.

CRUM, ADMINISTRATOR, v. MEEKS.

DECEDENTS' ESTATES.—*Sale of Land by Administrator.*—*Mortgagee not Party to Proceeding.*—*Lien not Divested.*—To divest the lien of a mortgage by an administrator's sale of land, the mortgagee must be made a party to the proceeding, and the court must order the sale of the land to discharge the lien. Where the mortgagee was not a party to the proceeding to sell, and the court did not order a sale to pay his mortgage, the lien of the mortgage was not divested, and the purchaser took the land subject to such lien, notwithstanding the administrator's assurance to the contrary.

SAME.—*Final Settlement.*—*When May be Set Aside.*—*Summons.*—Under section 2403, R. S. 1881, any person interested in an estate which has been finally settled, if he was not personally served with summons, and did not appear at the hearing of such final settlement, may have the same set aside if it affects him adversely, for any of the causes therein specified.

SAME.—*Final Settlement.*—*Action by Creditor to Set Aside.*—*Estoppel.*—When a creditor of a decedent seeks to set aside the final settlement of the administrator, on the ground that the administrator misappropriated the

Crum, Administrator, v. Meeks.

funds arising from the sale of certain real estate, he is not estopped from so doing because formerly he had brought a suit, in which he was defeated, to set aside the sale of the land, alleging as a reason therefor that the land sold too cheap. Neither is he estopped because he failed to object to certain acts and declarations of the administrator, it not appearing that he knew his rights, or that his failure to object in any degree influenced the conduct of the administrator, or that the administrator did not know all the facts as fully as he did.

From the Wells Circuit Court.

L. Mock and *A. Simmons*, for appellant.

E. R. Wilson and *J. J. Todd*, for appellee.

COFFEY, C. J.—David Taylor died intestate in Wells county in the year 1882, seized in fee of certain land upon which one McKee held a mortgage to secure the sum of eight hundred dollars, which was the only lien thereon. The appellant was duly appointed administrator of Taylor's estate, and the personal assets being insufficient to pay the debts, he filed a petition alleging that fact, and asking that the widow's interest in the land be set off to her in severalty, in order that he might sell the remaining two-thirds. Commissioners were appointed to make partition, and reported that the land could not be divided without injury to the owners; whereupon the court entered an order that the appellant, as administrator, should sell the land as a whole, and, after paying one-third to the grantee of the widow, that he should apply the remainder to the payment of the debts due from the estate. The land was accordingly appraised and sold, and the proceeds passed into the hands of the appellant. No mention was made of the McKee mortgage either in the petition or order of sale, nor was McKee made a party to the proceeding. At the time of the sale, which was at public auction, the appellant publicly announced that the McKee mortgage would be paid out of the proceeds of the sale, and that the purchaser would take the land freed from the lien of such mortgage. The land sold for its full value, the purchaser taking the same with the understanding and agreement that

Crum, Administrator, v. Meeks.

the mortgage should be paid out of the proceeds of the sale. The appellant, pursuant to such agreement, paid the McKee mortgage in full, and failed to pay the appellee's claim in full on account of the insolvency of the estate. A final settlement sheet was filed by the appellant, notice given by publication and posting notices, and the final settlement approved, and the appellant, as administrator, discharged.

No summons was served upon the appellee, and he did not appear at the final settlement.

He prosecuted this action in the court below to set aside the final settlement, and succeeded. This appeal is prosecuted from the judgment setting aside such final settlement, the appellant contending :

First. That no sufficient facts are shown to authorize the setting aside of the final settlement.

Second. That he had the legal right to pay the McKee mortgage in full.

Third. That the appellee is estopped from attacking and setting aside the final settlement on account of his conduct prior thereto.

Under the first contention it is claimed that there is no law in this State authorizing the issuing and service of a summons upon a creditor in case of a final settlement, and that a creditor, failing to appear in response to publication and posting notices, is precluded by the order discharging the administrator.

Section 2395, R. S. 1881, provided that if a final settlement account was filed after the expiration of the year, notice should be given to the creditors of the deceased of the time set for the hearing of the same. If any matter was exhibited in the account necessary to be answered, or specially to be determined by the court, it required the parties to be affected thereby to be personally summoned to attend the hearing of such account, and show cause why the same should not be approved.

Section 2403 provides that when any final settlement has

been made, and the administrator or executor discharged, any person interested in the estate not appearing at the final settlement, nor personally summoned to attend the same, may have such settlement, or so much thereof as affects him adversely, set aside at any time within three years for illegality, mistake, or fraud.

By an act approved March 7, 1883 (Acts 1883, p. 161), section 2395 was amended so as to omit therefrom the provision relating to serving a summons personally, and it is argued by the appellant that there is now no statute authorizing an administrator to sue out a summons upon filing his final settlement, and by reason of that fact the provisions of section 2403 in relation to such service are not operative.

We can not give our assent to this position. The repeal of statutes by implication is not favored, and a statute will not be held to be so repealed unless there is a clear conflict.

There is no conflict between section 2403 and the amended section 2395, and therefore the latter does not repeal the former. Section 2403 is not affected by the act approved March 7, 1883, and is still in force. It is too plain and unambiguous to require construction, and under its terms any person interested in an estate which has been finally settled, if he was not personally served with summons and did not appear at the hearing of such final settlement, may have the same set aside if it affects him adversely, for any of the causes therein specified. *Pollard v. Barkley*, 117 Ind. 40.

The second question presented for our consideration seems to be settled by the decisions of this court. In the case of *Massey v. Jerauld*, 101 Ind. 270, it was said: "Real estate encumbered by liens may be sold by an administrator in one of two ways: 1st. Subject to the liens; and, 2d. To discharge the liens. In the latter case the purchaser will take and hold the lands freed from the liens." In *Martin v. Beasley*, 49 Ind. 280, it is said, "Unless otherwise ordered by

. Crum, Administrator, v. Meeks.

the court, they (administrators) sell and convey the land subject to all encumbrances."

To divest the lien of a mortgage by an administrator's sale of land the mortgagee must be made a party to the proceeding, and the court must order the sale of the land to discharge the lien. In such case the lien is divested, and follows the proceeds of the sale. *Martin v. Beasley, supra*; *Boaz v. McChesney*, 53 Ind. 193; *Foltz v. Peters*, 16 Ind. 244; *Clarke v. Henshaw*, 30 Ind. 144; *State, ex rel., v. Kelso*, 94 Ind. 587; *Henderson v. Whiting*, 56 Ind. 131; *Moody v. Shaw*, 85 Ind. 88; *Brown v. Forst*, 95 Ind. 248.

In this case McKee, the mortgagee, was not a party to the proceeding to sell, nor did the court order a sale to pay his mortgage. It is plain, therefore, that the lien of the McKee mortgage was not divested, and that the purchaser took the land subject to such lien, notwithstanding the administrator's assurance to the contrary.

The question as to whether the land was sold subject to the lien of the mortgage or freed therefrom must be determined by the record, and not by the declarations of the administrator. *Massey v. Jerauld, supra*.

As the land of the deceased was sold subject to the McKee mortgage the appellant had no authority to pay such mortgage debt in full to the injury of the appellee. Such payment was illegal, and a final settlement giving credit for the amount thus paid was illegal, and was properly set aside.

We do not think the matter relied on by the appellant constitutes an estoppel. The only affirmative matter alleged against the appellee is that he brought a suit to set aside the sale of the land, alleging as a reason therefor that the land sold too cheap. In this action he was defeated.

We are not able to see any connection between the matters involved in that suit and the controversy here. In this case the appellee proceeds upon the theory that the sale of the land was legal, but alleges that the appellant misappropriated the funds arising from such sale.

 Dick *et al.* v. Mullins *et al.*

The other matters relied on as constituting an estoppel consist of the failure of the appellee to make objections to certain acts and declarations of the appellant, but it does not appear that the appellee knew his rights, or that his failure to object in any degree influenced the conduct of the appellant; nor does it appear that the appellant did not know all the facts as fully as the appellee. In such case there is no estoppel. *Hosford v. Johnson*, 74 Ind. 479.

There is no error in the record.

Judgment affirmed.

Filed May 25, 1891.

 No. 16,084.

DICK ET AL. V. MULLINS ET AL.

PRACTICE.—*Motion to Dismiss Appeal.—Notice to Appellants.—*Supreme Court Rule.—Under Rule 14 of the Supreme Court, a motion to dismiss an appeal because of the alleged insufficiency of the notice of appeal, will be overruled if the appellants have not been given notice of the motion.

BILL OF EXCEPTIONS.—*How Evidence Made Part of.—Stenographer's Report—*A bill of exceptions incorporating the evidence is always essential, as the evidence must come to the appellate tribunal under the sanction of the trial judge. Evidence can not be brought into a bill of exceptions by reference to a stenographer's report, but the report itself may be incorporated.

From the Pulaski Circuit Court.

W. Spangler and *J. M. Spangler*, for appellants.

B. Borders and *F. L. Dukes*, for appellees.

ELLIOTT, J.—Notice of the appeal was served upon the appellees, and the service is proved by the acknowledgment of their attorney. They have filed a motion to dismiss the appeal because of the alleged insufficiency of the notice of appeal, but they have not given the appellants notice of the

128	365
129	470
128	365
130	466
128	365
131	421

Dick et al. v. Mullins et al.

motion. The rules of the court require notice of such motions, and there must be a compliance with those rules. Rule XIV. The motion to dismiss the appeal is overruled, with instructions to the clerk to tax the costs of the motion against the appellees.

The questions argued by the appellants' counsel require an examination of the evidence, and that is not before us. The stenographer's report of the evidence does not, and can not, make the evidence a part of the record. The recital of the record is this: "And the defendants filed and presented a bill of exceptions, No. 1 being the stenographer's long-hand report of the evidence, taken upon the trial of this cause." The report is appended to the record, and is preceded by the certificate of the clerk. It is entirely clear that evidence can not be brought into the record in the mode here adopted. *Clark v. State, ex rel.*, 125 Ind. 1, and cases cited; *Fiscus v. Turner*, 125 Ind. 46; *Ohio, etc., R. W. Co. v. Voight*, 122 Ind. 288; *Doyal v. Landes*, 119 Ind. 479; *Wagoner v. Wilson*, 108 Ind. 210.

A bill of exceptions incorporating the evidence is always essential, as the evidence must come to the appellate tribunal under the sanction of the trial judge. There is no necessity for copying the stenographer's report, but the report must be embodied in the bill of exceptions before the judge signs it. Evidence can not be brought into a bill by reference to a stenographer's report, but the report itself may be incorporated. *Patterson v. Churchman*, 122 Ind. 379.

Judgment affirmed.

Filed May 25, 1891.

 Steele v. Aspy, Administrator.

No. 14,996.

STEELE v. ASPY, ADMINISTRATOR.

RECEIVER.—*Application for Appointment of.—Application, how Considered.—*

Applicant's Interest in Property.—Conditional Sale.—In an agreement for the sale or trade of a stock of goods, it was stipulated that the purchaser should not move the goods from the town in which they then were, but that he should be allowed to sell the same, and that he should turn over to the vendor all moneys arising from the sale of the goods until the difference between them was settled.

Held, that in order that the title may not pass, in the transfer of personal property, there must be a plain and express stipulation to that effect, and that under the foregoing facts the title had passed, and that the seller had no such right or interest in the property as entitled him to the appointment of a receiver, even if the purchaser was insolvent and was disposing of the goods and applying the proceeds to his own use, in violation of the terms of his contract.

Held, also, that in an application for a receiver the court must look to and consider the facts stated in the application, and unless they are sufficient to justify the appointment it must be denied.

From the Jay Circuit Court.

J. J. M. La Follette, D. T. Taylor and R. H. Hartford, for appellant.

P. B. Manley, J. T. France and J. T. Merryman, for appellee.

MCBRIDE, J.—This was an appeal from an order appointing a receiver on the application of the appellee, as administrator *de bonis non* of the estate of Isaac Nelson, deceased.

On the 3d day of November, 1888, said decedent and appellant entered into a contract, of which the following is a copy :

“GENEVA, IND., Nov. 3d, 1888.

“Article of agreement between Isaac Nelson and Alva Steele. The said Isaac Nelson doth agree to trade to Alva Steele a certain stock of goods in the town of Geneva, the goods to be invoiced at cost and carriage, except damaged goods to be taken for what they are worth. The said Alva

128	367
134	306
128	367
142	409
128	367
145	550
128	367
157	298

Steele v. Aspy, Administrator.

Steele trades property in the town of Dunkirk, located on Main and Converse streets, one located on railroad grounds. The said property to be taken at thirteen hundred dollars. The said Alva Steele agrees not to move the stock of goods from the town of Geneva, but allowed to sell said goods, and all money taken in to be turned over to Isaac Nelson until difference is satisfied.

"ISAAC NELSON.

"ALVA STEELE."

Appellee brought suit to collect the sum of \$1,008, which he alleged was the difference between the invoice-price of the goods and the property transferred by Steele to decedent. The complaint charges, in substance, that the appellant has sold goods out of said stock to the amount of \$500, but that, instead of paying the same over as required to do by the terms of the contract, he has retained all of it, and has applied it to his own use, that he is wholly and notoriously insolvent, and is still selling, and threatening to sell and otherwise dispose of said goods and apply the proceeds of such sales to his own use, in violation of the terms of said contract, and that if he is permitted to retain possession of said stock of goods said claim will be wholly lost to the estate.

The only showing and application for the appointment of a receiver was contained in the complaint, which was verified.

To authorize the interposition of the court by the appointment of a receiver, it was essential that the appellee should show either a clear legal right in himself to the property in controversy, or that he had some lien upon or property right in it, or that it constituted a special fund out of which he was entitled to satisfaction of his demand. It was essential, to authorize the exercise of such jurisdiction, for the appellee to show that he had a present, existing interest in the property. High Receivers, sections 11 and 12; Beach Receivers, section 5; *Smith v. Wells*, 20 Howard Prac. Rep. 158.

In High on Receivers, it is said: "It is in all cases es-

Steele v. Aspy, Administrator.

sential that the plaintiff should have a present existing interest in the property over which he seeks to have a receiver appointed; and when it is apparent that he has parted with his entire interest in and title to the property the court will not interfere." Section 12, *supra*. In Beach on Receivers, it is said: "The right of the plaintiff to the property must be an existing one. If he has parted with his interest, a receiver will be refused." Section 5, *supra*.

It is clear that the appellee had no such right or interest in the property as entitled him to the appointment of a receiver.

That there may be a conditional sale of personal property whereby the vendor retains the ownership until the price is paid, although he parts with possession, is well settled in this State. *Bradshaw v. Warner*, 54 Ind. 58; *Thomas v. Winters*, 12 Ind. 322; *Dunbar v. Rawles*, 28 Ind. 225; *Hodson v. Warner*, 60 Ind. 214; *Domestic Sewing Mach. Co. v. Arthurhultz*, 63 Ind. 322; *Winchester, etc., Co. v. Carman*, 109 Ind. 31.

That the title may not pass in such cases, however, there must be a plain and express stipulation to that effect. The vendor clothing the vendee, as he does, with all the *indicia* of ownership, whereby as to third parties he is apparently the owner, must make his reservation explicit and unequivocal. It is not the policy of the law to encourage such sales, or to construe as conditional a sale where the reservation is equivocal or doubtful.

In the case of *Winchester, etc., Co. v. Carman, supra*, it was held that where a sale of goods was made to one who, as in this case, was to retail them, an express stipulation that the sale was conditional, and the title should not pass until the goods were paid for, was void as to creditors of the vendee.

By the sale in this case the title unquestionably passed to Steele. There can be no doubt that the property would

The Citizens' Insurance Company v. Hoffman.

have been subject to levy and sale on an execution against him, or that if levied upon he could, if a resident householder entitled to exemption, have claimed \$600 in value of it, as exempt from execution. That the debt the appellee was seeking to collect was for a part of the purchase price of the goods in question can make no difference. The vendor of chattels retains no lien thereon for purchase-money after he has voluntarily yielded possession to the vendee. Schouler Personal Property, section 555.

Appellee insists that the court can not construe the contract, or consider the sufficiency of the facts stated in the complaint to justify the appointment of a receiver, citing *Pouder v. Tate*, 96 Ind. 330; *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510; *Pressley v. Harrison*, 102 Ind. 14; *Bufkin v. Boyce*, 104 Ind. 53. The cases cited are not authority in support of appellee's contention. It is true, pleadings and demurrers are not relevant to such an application, but of necessity the court must look to and consider the facts stated in the application, and unless they are sufficient to justify the appointment it must be denied.

The court erred in appointing a receiver in this case.

Judgment reversed with costs.

Filed May 25, 1891.

No. 15,038.

THE CITIZENS' INSURANCE COMPANY v. HOFFMAN.

INSURANCE.—Application.—Warranties.—Statements made by the insured in his application for insurance are not deemed warranties unless they are incorporated in the policy, or, in some appropriate method, referred to in that instrument.

SAME.—Conditions of Policy.—Where the insured represents in his letter of application for insurance that a certain amount of insurance will be maintained, but the application is not incorporated in the policy or

The Citizens' Insurance Company v. Hoffman.

made a part thereof by reference, no inference arises that the policy was issued upon the condition mentioned in such letter of application.

From the Vanderburgh Circuit Court.

S. J. Peelle, W. L. Taylor, A. Gilchrist and C. A. De Bruler, for appellant.

T. E. Garvin, Jr., and G. Cunningham, for appellee.

MILLER, J.—The appellee sued the appellant to recover on a policy of insurance, by which the appellant, in consideration of fifteen dollars, agreed to indemnify him to the extent of \$1,500 against loss by fire of the property therein described.

The complaint was in two paragraphs. The first averred a total loss of \$90,000, and asked for judgment for \$1,500, the full amount of the policy.

The second averred a loss of \$51,000, a total insurance of \$60,000, and that the defendant was liable for such proportion of the loss as the amount of its policy bore to the whole amount of insurance carried.

The defendant answered in two paragraphs. The first avers that by the policy the defendant agreed to pay only the one-sixtieth of the loss, that the loss was \$51,000, and that the defendant was liable for the one-sixtieth of that amount, viz., \$850, and interest, and no more.

In the second paragraph it is alleged that the application for the policy was in a letter addressed by the plaintiff to the managers of the defendant; that in such application the plaintiff represented that the amount of insurance upon the property described in the policy filed with the complaint, which was at all times carried by the plaintiff, was \$90,000, including the amount applied for; that in such letter the plaintiff represented and guaranteed that there was, and should thereafter be, during the time the defendant might insure the property, an insurance in the sum of \$90,000; that the letter had been lost and the defendant was therefore unable to file a copy of the same with the answer; that the

The Citizens' Insurance Company v. Hoffman.

policy was issued solely in consideration of the representation and guaranty contained in the letter ; that by the terms of the policy the defendant only agreed to pay the one-sixtieth of the loss which the plaintiff might sustain by fire on each of the items of property described in the policy.

It is averred that the plaintiff, in violation of said representation and guaranty, did not keep and maintain \$90,000 insurance upon the property, but only had \$60,000 insurance at the time of the fire ; that the total loss sustained was \$51,000, of which the defendant was liable for \$850 and interest, and no more.

Demurrers were sustained to each of these paragraphs of answer, and the defendant declining to plead further, judgment was rendered for \$1,275 and interest.

Appellant assigns as error the ruling of the court in sustaining the demurrers to these paragraphs of answer.

The facts stated in the complaint, and the issues of law and fact presented by the first paragraph of answer, are substantially the same that were considered and ruled upon in the case of *Indiana Insurance Co. v. Hoffman*, ante, p. 250, and upon the authority of that case we hold that the court did not err in sustaining the demurrer to the first paragraph of answer.

In the second paragraph of answer the letter written by the assured to the company is relied upon either as a warranty or a representation.

In *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352, this court, in distinguishing between a representation and a warranty, cites, with approval, the following definition of a representation as "a verbal or written statement, made by the assured to the underwriter, before the subscription of the policy, as to the existence of some fact, or state of facts, tending to induce the underwriter more readily to assume the risk, by diminishing the estimate he would otherwise form of it. It is a part of the preliminary proceedings which propose the contract ; and a warranty is a part of the contract, as it has

The Citizens' Insurance Company v. Hoffman.

been completed." May Ins. (3d ed.), section 159; Wood Fire Ins. (2d ed.), section 150.

It will be observed that there is no allegation in the answer that there was \$90,000 insurance on the property at the time the policy was issued. Neither is it claimed in the answer that at, or prior to, the time the policy was issued the assured made any statement of fact that was not, at the time, true.

It is contended, that, if the application did not contain a misstatement of fact, it constituted a warranty or guarantee that the assured would maintain \$90,000 insurance on the property.

It nowhere appears from the policy that the application was incorporated in, or made a part of, the same. We find in the policy this clause: "If an application, survey, plan, or description, is referred to in this policy, such application, survey, plan, or description is hereby made a part of this contract, and a warranty by the assured."

This language is significant when taken in connection with the fact that no reference was made in the policy to any application having been made for insurance.

The necessity for making the application a part of the policy in order to make any statements therein contained warranties, is tersely stated by ELLIOTT, J., in *Presbyterian, etc., Fund v. Allen*, 106 Ind. 593, as follows:

"Statements made by the insured in his application for insurance are not deemed warranties unless they are incorporated in the policy, or, in some appropriate method, referred to in that instrument."

It does not come within the rule of construing and reading together papers contemporaneously executed, as parts of the same contract (*Burns v. Singer Mfg. Co.*, 87 Ind. 541, and *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334), for the policy is a complete instrument and contract within and of itself, containing no reference or allusion to any other instrument.

It is evident, from the averments of the answer, taken in

Montgomery v. McCumber *et al.*

connection with the policy, that the company, instead of accepting the terms of the letter, by inserting a clause in the policy to that effect, as is usual when a given amount of insurance is to be maintained, issued the policy, giving the assured the privilege of making other insurance, without limit or notice, until required.

The general and well-settled rule is, that the application forms no part of the policy, unless it is referred to and adopted. Wood Fire Ins., section 138; May Ins., section 159; *Owens v. Holland Purchase Ins. Co.*, 56 N. Y. 565; *Commonwealth Ins. Co. v. Monninger*, *supra*.

Holding, as we do, that the company did not adopt, or treat, the application as a part of the policy, no inference arises that the policy was issued upon the terms or conditions mentioned in the letter, or application, for it might well be inferred that the terms of the application were not satisfactory to the insurers, and that they therefore chose to make the contract upon their own terms, and independent of the application.

We are of the opinion that the court did not err in sustaining the demurrer to the second paragraph of the answer.

Judgment affirmed

Filed May 26, 1891.

No. 15,056.

MONTGOMERY v. McCUMBER ET AL.

DECEDENTS' ESTATES.—*Childless Second Wife.*—*Interest in Husband's Realty.*—

Rights of Children.—Under the statute previous to the amendment of 1889 a childless second wife takes a fee simple title in one-third of the real estate of which her husband died seized. At her death the children of the husband by a former marriage become her forced heirs, and the quitclaim deeds of such children do not estop them from recovering the land after the death of the widow. The said deeds only pass the title held by the grantors at the time of the conveyances.

From the Gibson Circuit Court.

Montgomery v. McCumber *et al.*

C. A. Buskirk and J. W. Brady, for appellant.

S. H. Kidd, W. M. Land and J. B. Gamble, for appellees.

OLDS, J.—This is an action by the appellees against the appellant for the partition of and to quiet the title to certain real estate.

The court found the facts specially, and stated its conclusions of law.

The facts found show that in 1866 one Johnson Fitzgerald died intestate the owner in fee of the real estate in controversy, leaving surviving him Willy Ann Fitzgerald, a second wife, by whom he had no children. He also left surviving him children and grandchildren by a former marriage, among whom are the appellees. In 1867 certain of the adult heirs of said Johnson Fitzgerald conveyed by quitclaim deed their interest in the lands of which Johnson Fitzgerald died seized to James Montgomery, who in 1868 instituted suit in the common pleas court against Willy Ann Fitzgerald, the widow, and the other heirs who had not conveyed to him, for the partition of said land.

In the partition proceedings the land in controversy, a certain fifty-three-acre tract, was set off to the widow to hold during her natural life, and the same tract was assigned and set off to James Montgomery, subject to the widow's life-estate. Afterwards James Montgomery conveyed the tract of land to other parties, who conveyed the same to the widow. In 1887 the widow died intestate, leaving surviving her as her only heir at law the appellant Mary J. Montgomery, her daughter by a former marriage. At the time of the death of the widow Willy Ann Fitzgerald, there were living of the children and grandchildren of Johnson Fitzgerald the appellees, who claim an interest in the land and bring this suit.

The court stated as conclusions of law that the appellees were entitled to partition and to have their title quieted.

The question presented and discussed is, What interest did

Montgomery v. McCumber *et al.*

the surviving childless second wife take in the lands of her deceased husband?

It is contended by the appellant that she took but a life-estate, and that the children by the former marriage took the fee, and by their conveyances the title passed to Montgomery and from Montgomery to his grantees, and from them by mesne conveyances to the widow, and at her death it descended to her only child and heir, the appellant.

On the other hand, it is contended by the appellees that at the death of Johnson Fitzgerald the widow took a fee simple title in the one-third, which, at her death, descended to the children of Fitzgerald by the former marriage; that the quitclaim deeds only conveyed to the grantee the interest they had in the two-thirds, and that they are not estopped from recovering their interest in the one-third which they take as the forced heirs of the second and childless wife.

Counsel for appellant contend that, at the date of the conveyance from the children to Montgomery, and at the date of the partition, also at the time of the execution of the subsequent conveyances by which the widow received the title vested in Montgomery, under the law as then declared by the decisions of this court in the cases of *Martindale v. Martindale*, 10 Ind. 566, *Ogle v. Stoops*, 11 Ind. 380, and *Rockhill v. Nelson*, 24 Ind. 422, the widow only took a life-estate in the one-third, and the children of the former marriage took a fee, and that the rights of the parties are fixed and measured by the law as then declared.

The question presented can scarcely be regarded as an open one, as all of the principles involved have been passed upon and held adversely to the appellant by numerous recent decisions of this court.

The language of the statute previous to the amendment of 1889 declares, and the decisions have so held, that the childless second wife takes a fee simple, and at her death the children of the husband by a former marriage become her forced heirs, and it has been held that the quitclaim deeds

The Town of Freedom v. Norris.

of such children do not estop them from recovering the land after the death of the widow. The quitclaim deed only passes the title held by the grantor at the time of the conveyance. See *Bryan v. Uland*, 101 Ind. 477, where the authorities are collected; also, *Thorp v. Hanes*, 107 Ind. 324; *Erwin v. Garner*, 108 Ind. 488; *Gwaltney v. Gwaltney*, 119 Ind. 144. These decisions are decisive of the question presented.

Judgment affirmed, with costs.

Filed June 9, 1891.

No. 15,032.

THE TOWN OF FREEDOM v. NORRIS.

128	377
140	219
143	87
128	877
144	454
144	607
146	561
146	575
147	490

EASEMENT.—Implied Dedication.—The implied dedication by the owner of land platted for a town site of a strip of land fronting a river, to the public as a common, for the purpose of a landing, and for access to the river, does not vest in the town, or in the public, the fee of the land, but the fee remains in the grantor, subject to the easement.

SAME.—Alluvial Accretions.—Such easement attaches to alluvial additions caused by changes in the course of the river, and the public has the right to pass over such additions for the purpose intended by the dedication.

SAME.—Abandonment of Landing.—Non-User of Easement.—A non-user of the easement, for the purpose intended, for a period of thirty years, due to an abandonment of commerce upon the stream, will be taken as an abandonment of the easement.

SPECIAL FINDING.—Judgment.—Intendment.—To warrant a judgment in favor of a party, on a special finding, the finding must contain all the facts necessary to the judgment, and nothing is to be taken by intendment.

From the Owen Circuit Court.

I. H. Fowler and W. A. Pickens, for appellant.

D. E. Beem and W. Hickam, for appellee.

COFFEY, C. J.—This was an action by the appellant against the appellee, in the Owen Circuit Court, to recover

The Town of Freedom v. Norris.

the possession and to quiet the title to the land described in the complaint.

The complaint consists of two paragraphs. The first alleges that the appellant is the owner in fee simple and entitled to the possession of the land, and that the appellee unlawfully keeps it out of possession.

The second paragraph alleges that the appellant is the owner in fee simple of the land, and that the appellee is asserting an unfounded title thereto, which casts a cloud upon the title of the appellant.

The cause was tried by the court, which, at the request of the appellant, made a special finding of the facts proven, and stated its conclusions of law thereon.

The appellant excepted to the conclusions of law, and assigns as error that the circuit court erred in such conclusions.

The material facts in the case, as disclosed by the special finding, are, that on the 18th day of November, 1834, John R. Freeland, then the owner in fee simple of the west fractional northwest quarter of section twenty-one (21), in township nine (9) north, of range four (4) west, comprising all of said northwest quarter west of White river, caused to be surveyed and platted what has since been known as the town of Freedom. The plat was never acknowledged, and was not recorded until the 10th day of August, 1841. As shown by the plat, Randolph street, Wall street, Spring street, Market street, Hill street, Limestone street and Franklin street run east and west, and Water street runs north and south, the latter being on the extreme eastern boundary of the town, and is sixty feet in width. At the time the plat was prepared there was a strip of land eighty feet wide between Water street and White river, extending from Franklin street south to a point midway between Spring and Market streets. This strip was impliedly dedicated by Freeland to the public as a common for the purpose of making, loading and landing flat boats then used to carry freight on

The Town of Freedom v. Norris.

the river, and for access to the river. The dedication was accepted by the public and the citizens of the town, and used by them for the purposes for which it was dedicated until about the year 1852. Between the years 1834 and 1852 the river washed away the land so dedicated to such an extent that the west bank of the river ran near the east edge of Water street, and by reason thereof said strip was not, and, indeed, could not be used by the public for the purposes intended by the dedication. About the year 1862 the business of flat-boating on White river was entirely abandoned at the point in controversy, and has never since been resumed. After the change in the stream, and the abandonment of the dedicated land for the purposes above stated, the river again, by gradual process, changed its course at this point, and for more than thirty years prior to the time this cause was tried the eighty-foot strip above described, and all its accretions, have been claimed and occupied by the appellee and his grantors, who have kept the same in cultivation as farm lands, so far as they were capable of cultivation, and have paid the taxes on the same. About the year 1857 the land dedicated being partially washed away at some points, and wholly in the river at other points, the same fell into disuse by the public and by the town of Freedom as a boat-yard or landing, and has not since that date been used for public purposes.

At the time Freeland platted the town of Freedom he retained a strip one hundred feet wide on the north side of the town, and a like strip on the south side, neither of which was included in the platted territory nor in the dedication.

The accretions caused by the gradual change in the river attaching to the strip dedicated by Freeland, and to the land retained by him, not dedicated or included in the platted territory, now amount to about twenty-five acres.

The appellee makes title to the land by a regular chain of conveyances from Freeland to himself. Neither the town of Freedom nor the public has at any time within thirty

The Town of Freedom v. Norris.

years prior to the trial of this cause had possession of, or used, or occupied, any of said land, except that portions of the strip dedicated, and which had been used for the purpose of access to a church, and to reach a public highway; but it has not been used for any of the purposes intended by the dedication, or for which it was accepted by the public.

The town of Freedom was incorporated in June, 1888. The town, as incorporated, includes the land in controversy. Under these facts the court found, as matter of law, that the appellant was entitled to the land dedicated, and no more.

The appellant claims the land in controversy under the implied dedication made by Freeland in 1834, while the appellee claims under regular conveyances executed by Freeland, and those claiming under such conveyances.

The dedication mentioned in the special finding did not vest in the town of Freedom, nor in the public, the fee to the eighty-foot strip of land, over which the public was given the right to pass, but left the fee in Freeland, subject to a mere easement. Freeland, or his grantees, at any time since the dedication could have maintained ejectment against any one taking unlawful possession of the strip. *Terre Haute, etc., R. R. Co. v. Rodel*, 89 Ind. 128. It is plain, therefore, under the repeated holdings of this court, that the appellant could not recover under the first paragraph of its complaint, as it declares upon a fee simple title. *Stout v. McPheeters*, 84 Ind. 585; *Stehman v. Crull*, 26 Ind. 436; *Rowe v. Beckett*, 30 Ind. 154; *Groves v. Marks*, 32 Ind. 319; *Hunt v. Campbell*, 83 Ind. 48.

Assuming, without deciding, that the appellant, under the second paragraph of the complaint, was entitled to the relief sought, we proceed to an examination of the title of the respective parties to the suit.

It may be remarked at the outset that it is well settled at common law that one owning land in fee, bounded by a stream of water, is the owner of all the accessions to such land caused by a gradual change in the channel of such

The Town of Freedom v. Norris.

stream. When such land is subject to an easement, the question as to whether such accretion becomes a part of the easement depends, of necessity, upon the nature of the easement, the intention, express or implied, of the party granting, or dedicating, the same, and the intention of those accepting and acting upon such grant, or dedication. If one owning land bounded by a stream should dedicate a public highway running parallel with the stream, and extending to the water's edge, and accretions should take place beyond the highway not necessary to its use, it could not be contended with reason, that such addition to the land belonged to the public, or was subject to the easement granted.

But if one owning the fee should dedicate a public highway running to a public ferry, or to a public dock or boat-landing, and accretions should take place after the dedication, over which it was necessary to pass in order to reach the ferry or dock, then such accretions would become subject to the easement so dedicated, otherwise the object of the donor would be defeated and the public would suffer. The law as applicable to the latter class of cases is fully discussed and illustrated in the well-considered cases of *Saulet v. Shepherd*, 4 Wallace, 502; *Gravier v. City of New Orleans*, 1 Condensed Rep. 551; *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 123; *Cook v. City of Burlington*, 30 Iowa, 94; and *Mayor, etc., v. United States*, 10 Peters, 660.

In the latter case cited it was said by the court: "The question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded, is subject to loss, by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he can not be held accountable for his gain. This rule is no less just, when applied to public, than to private rights."

The Town of Freedom v. Norris.

It is not strictly correct, however, to say that such alluvial formation attaches to the easement, for that is a mere incorporeal hereditament, but it attaches to the land covered by the easement, and the right of the public to use the accretion to the same extent as the land over which it was granted, at once attached to the addition.

In our opinion the easement dedicated by Freeland in this case was of such a nature that it attached itself to the alluvial formations added to the eighty-foot strip of land described in the special finding, and conferred upon the public the right to pass over such formations for the purposes intended by the dedication. Had there been a continuous use of the easement created by Freeland's dedication, the case would be free from difficulty ; but, as we have seen, the easement had not been used for a period of more than thirty years before the commencement of this suit, and the chief object sought by Freeland, namely, the promotion of commerce on White river, had ceased to exist.

It is contended by the appellee that under these circumstances we must presume an abandonment of the easement created by the implied dedication made by Freeland in the year 1834.

Whatever may be the rule as to an easement created by express grant, much authority is to be found holding that public easements created by an implied dedication may be abandoned by the public. It seems to be settled that a town or city may not abandon its public streets and alleys, and that the statute of limitations does not apply to one who wrongfully obstructs the same, and this, principally upon the ground that such obstruction is a public nuisance, indictable, and is a continuing offence. *Pettis v. Johnson*, 56 Ind. 139 ; *Sims v. City of Frankfort*, 79 Ind. 446. But that this rule does not apply to easements other than streets and alleys, and such as are not necessary to the public convenience, seems to be settled. *Washburn Easements and Servitudes*, pp. 242 and 243 ; *City of Pella v. Scholte*, 24 Iowa,

The Town of Freedom v. Norris.

283; *Callaway Co. v. Nolley*, 31 Mo. 393; *Baldwin v. City of Buffalo*, 29 Barb. 396; *Commissioners, etc., v. Taylor*, 2 Bay, 282; *Collett v. Board, etc.*, 119 Ind. 27; *Fox v. Hart*, 11 Ohio, 414; *Rowan v. Town of Portland*, 8 B. Mon. 242; *Knight v. Heaton*, 22 Vt. 480.

In *City of Pella v. Scholte*, *supra*, the title to a public square was involved, and in discussing the questions arising on the statute of limitations, Dillon, C. J., who delivered the opinion of the court, said: "Rights of this character may be acquired by the public by the requisite user, and it would seem reasonable that the public, with a knowledge of its rights and of the adverse claim by an individual, may lose those rights in a similar manner."

The maxim "once a highway always a highway," does not exist except where it involves the rites of abutters or those occupying a similar position.

In *Elliott Roads and Streets*, p. 658, it is said: "But, where no such rights are involved, the public may either abandon or vacate a highway, and, where such rights do exist, they may also be abandoned by those entitled to assert them. * * * It is proper, therefore, to state that the highway may cease to exist either by abandonment or vacation according to law."

In this case the easement in question was dedicated for the purpose of facilitating commerce on White river by means of transporting freight on flat boats. In carrying on such business it was necessary that the public should have access to the river in order to build and load boats, and to deliver and receive such articles as had been or were to be shipped. Commerce on the river was entirely abandoned more than thirty years before the commencement of this suit, and with such abandonment the public ceased to use the easement in controversy.

We are of the opinion that when commerce on White river ceased the easement in question ceased also to ex-

The Town of Freedom v. Norris.

ist. If one owning the fee should dedicate a right to pass over his land to reach a particular church or other public place, if the church or other place should be destroyed or abandoned, the right of the public to continue the use of the way for purposes other than those for which it was intended could not be maintained. So, in this case, as the easement was given for the purpose of carrying on commerce on White river, we think the right to use it ceased with the cessation of commerce on that stream, and that it must be held that the non-user for the period of thirty years, when taken in connection with the other facts in the case, amounts to an abandonment of the rights created by the implied dedication by Freeland to pass over his land.

We think the judgment should be affirmed on still another ground.

It is not shown by the special finding of facts that the alluvial additions constituting the twenty-five acres of land in controversy extend east of the land dedicated by Freeland. For anything that appears it may belong to the land retained by Freeland not included in the dedication. If we should reverse the cause, with instructions to the circuit court to re-state its conclusions of law and render a decree for the appellant, to what land should the decree apply? Certainly not to the alluvial attached to the land reserved by Freeland.

The burden was upon the appellant to show what alluvial, if any, was attached to the land covered by the easement, and as the court does not find that any addition has been made to this particular land by accretions, we must presume that there was none. *Vinton v. Baldwin*, 95 Ind. 433; *Citizens Bank v. Bolen*, 121 Ind. 301.

To warrant a judgment in favor of a party on a special finding the finding must contain all the facts necessary to the judgment, and nothing is to be taken by intendment. *Vinton v. Baldwin*, *supra*; *Buchanan v. Milligan*, 108 Ind.

Scott v. Stetler et al.

433; *Waymire v. Lank*, 121 Ind. 1; *Kehr v. Hall*, 117 Ind. 405.

In our opinion the court did not err in its conclusions of law on the facts found.

Judgment affirmed.

Filed May 26, 1891.

No. 14,171.

SCOTT v. STETLER ET AL.

PRACTICE.—*Demurrer.*—*Answer.*—*Insufficient Paragraph.*—*Overruling Demurrer to.*—*Effect of.*—It is error to overrule a demurrer addressed to an insufficient paragraph of answer, although there are other and more comprehensive paragraphs of answer.

COVENANT.—*Running with Land.*—*What is.*—A covenant in a deed of certain premises, "together with the mill and all privileges and easements thereto belonging," is a covenant running with the land that the grantors had a right to maintain the dam at the height it was when the deed was made.

SAME.—*Action for Broken Covenant.*—*Subsequent Grantee.*—*When can not Maintain.*—In a suit by a subsequent grantee against the grantors in the above deed based upon the breaking of said covenant, the grantors may successfully defend by showing that they sold the land with the agreement that the grantees, among other things, were to repair or rebuild the old dam, and that it should not be raised beyond its original height; that for the purpose of deceiving their grantors the grantees destroyed the marks indicating the height of the dam, and falsely represented that the height was not increased, and that therefore the grantors executed the deed in ignorance of the fact that the height of the dam had been increased.

From the Kosciusko Circuit Court.

J. S. Frazer and *W. D. Frazer*, for appellant.

H. S. Biggs, *S. J. North* and *J. D. Cook*, for appellees.

ELLIOTT, J.—The contention of appellees' counsel that
VOL. 128.—25

128	386
129	254
128	386
133	118
133	164
128	386
136	177
128	386
146	93

Scott v. Stetler *et al.*

an error in overruling a demurrer to an insufficient paragraph of answer is harmless in a case where there are other and more comprehensive paragraphs of answer, can not prevail. Counsel confuse a ruling holding a good paragraph bad with a ruling holding a bad paragraph good, and are thus led into a radical error, for there is a clear and important difference between the two classes of cases. It may not prejudice a defendant to sustain a demurrer to one paragraph of an answer, where there are others of similar character; but it does prejudice a plaintiff to hold an answer to be a bar to his cause of action which does not contain facts constituting a defence. The question is, however, so fully covered by the decisions that discussion is not required. *Messick v. Midland R. W. Co.*, *ante*, p. 81; *Thompson v. Lowe*, 111 Ind. 272; *Epperson v. Hostetter*, 95 Ind. 583; *McComas v. Haas*, 93 Ind. 276 (281); *Eve v. Louis*, 91 Ind. 457 (463); *Sims v. City of Frankfort*, 79 Ind. 446 (449); *Over v. Shannon*, 75 Ind. 352; *Kernodle v. Caldwell*, 46 Ind. 153 (158); *Abdil v. Abdil*, 33 Ind. 460.

The appellant's complaint is founded upon a deed executed by the appellees to Joseph Harris and James G. Ackerman, in 1877. By successive conveyances the appellant became the owner of the real estate described in the deed. The deed of the appellees conveyed a flouring mill and appurtenances. At the time the deed was executed a dam five feet in height was appurtenant to the land, and created the pool from which the water that propelled the mill machinery was obtained. The dam caused the water to flow back upon the land of Julia Hubbell, and for the injury thus produced she brought an action against the appellant, and, after a contest, recovered judgment for damages, and also secured an order reducing the height of the dam to three feet. The appellees were notified to defend the action. To the complaint, which stated the facts of which we have given a synopsis, the appellees answered that they sold to John Anderson and Joseph Harris two-thirds interest in the land, mill and appurte-

Scott v. Stetler et al.

nances; that Anderson and Harris agreed to build a new flouring mill; that they also agreed that they would repair, or rebuild, the old dam, and that it should not be raised beyond its original height; that for the purpose of deceiving the appellees, Anderson and Harris destroyed the marks indicating the height of the dam, and without the knowledge of the appellees wrongfully increased the height, and falsely represented that the height was not increased; that Ackerman subsequently purchased an interest in the property, and united with Anderson and Harris in the contract, and that the deed set forth in the complaint was executed in ignorance of the fact that the height of the dam had been increased.

If the original parties, Harris, Anderson and Ackerman, were seeking to recover for a breach of the covenants on the deed executed to them, there would be no difficulty in determining the controversy, for it is perfectly clear that they could not recover, inasmuch as the breach was the result of their own culpable wrong. If the appellant can recover, it must be for the reason that he occupies a better position than the persons from whom he derives his title. The general rule—and it is a rule of wide sweep with comparatively few exceptions—is that an assignee can take no higher or greater rights than his assignor possessed. The appellant must prove that the case constitutes an exception to the general rule, since one who asserts that his case forms an exception must make good his assertion. It is necessary, therefore, to ascertain and decide whether the appellant does occupy a better position than his grantors.

It is tacitly assumed in the argument of the appellant that there is a covenant that the grantors had a right to maintain the dam at the height it was at the time the deed was made, and upon this assumption it is argued that, as this covenant runs with the land, there is vested in the appellant, as a remote grantee, the right to maintain an action for its breach. In our opinion the assumption is a valid one. Under a deed such as that through which the appellant claims

Scott v. Stetler *et al.*

title, the right to maintain a dam is part of the property conveyed, for that deed contains, as part of the description of the premises conveyed, the following recital: "Together with the mill and all privileges and easements thereto belonging." The right to maintain the dam and to overflow adjacent land was a privilege and an easement, and the appellees assumed to convey all easements and privileges. *Bass v. City of Fort Wayne*, 121 Ind. 389. The covenant runs with the land because it has nothing of the quality of a personal covenant and does have the essential elements of a real covenant. *Nye v. Hoyle*, 120 N. Y. 195; *Fresno Canal Co. v. Rowell*, 80 Cal. 114 (13 Am. St. R. 112); *Hazlett v. Sinclair*, 76 Ind. 488 (40 Am. R. 254); *Conduitt v. Ross*, 102 Ind. 166; *Midland R. W. Co. v. Fisher*, 125 Ind. 19. The right to maintain the dam adds to the value of the property and is, in fact, part of it. In other words, the incorporeal right is an essential part of the estate assumed to be conveyed. The covenant, therefore, necessarily referred to the estate itself and not to a personal or collateral matter, and is one running with the land. We shall assume, without deciding, that the covenant was broken when the appellant was evicted from part of the easement, and that the right of action then accrued, and upon this assumption consider the question that remains.

It is evident, from what has been said, that, upon the assumption made for argument's sake, the right of the appellant to recover depends, as we have already suggested, upon whether his rights as a covenantee rise above the rights of the persons through whom his title as covenantee is derived. We recognize the force of the reasoning in such cases as *Suydam v. Jones*, 10 Wend. 180 (25 Am. Dec. 552); *Green-vault v. Davis*, 4 Hill, 643; *Kellogg v. Wood*, 4 Paige Ch. 578, in so far as it proceeds upon the proposition that a covenant running with the land is protected against equities as fully as the title itself, but we perceive little force in the argument that a parol release is not valid because an instrument

Griswold v. Ward *et ux.*

under seal can not be affected by an instrument of less dignity. We shall not, however, enter upon a discussion of the general subject, for we regard the question as settled by our own decisions. The decisions in the cases of *Robinius v. Lister*, 30 Ind. 142; *Gavin v. Buckles*, 41 Ind. 528, and *Coleman v. Lyman*, 42 Ind. 289, affirm that the grantor may successfully defend against a remote grantee. This rule has become one of property, hence it is our duty to adhere to it, and adjudge that a defence, valid against an immediate grantee, is equally effective against a remote grantee.

Judgment affirmed.

OLDS, J., did not participate in the decision of this case.

Filed May 26, 1891.

No. 15,141.

GRISWOLD v. WARD ET UX.

LIS PENDENS.—*Purchaser without Notice.*—*New Trial as of Right.*—*Reversal of Judgment.*—Where a plaintiff in ejectment recovers a judgment for possession against the owner in fee, who is in possession of the land, and within the year allowed by statute the defendant obtains a new trial as of right, upon which he recovers, one who purchases without notice a mortgage executed by the plaintiff after the first judgment and before the new trial is taken, is not an innocent purchaser within section 1066, R. S. 1881.

From the Steuben Circuit Court.

R. W. McBride, for appellant.

J. M. Somers, J. I. Best and F. S. Roby, for appellees.

COFFEY, C. J.—This was an action by the appellant, in the Steuben Circuit Court, against Leyman Pierson and his wife, the appellees herein, Ancil Ward and wife and others, to foreclose a mortgage.

Griswold v. Ward *et ux.*

The complaint alleges that, on the 11th day of August, 1885, the defendant, Leyman Pierson, executed his note, payable to John M. Somers and Frank S. Roby, for the sum of one hundred and fifty dollars; that at the same time he executed a mortgage upon the land in controversy in this suit to secure the payment of said note, which mortgage was duly recorded; that before said note became due the said Somers and Roby endorsed the same for value to the appellant; that the defendants other than Pierson claim some interest in said land adverse to said mortgage, but that such interest as they may have therein is junior and subject to the lien of said mortgage.

The note secured by the mortgage in suit was made payable at a bank in this State.

The appellees Ward and his wife filed a joint answer in two paragraphs.

The first paragraph avers that Ancil Ward was, at the time of the execution of the note and mortgage in suit, the owner in fee of the land described in the mortgage, and was in the peaceable possession of the same, and that he had ever since continued to be the owner of said land, and that Pierson never had any title thereto.

The second paragraph of the answer avers that at the time of filing the answer Ward was, and at the time of the execution of the mortgage had been, declared the owner of the land therein described in fee simple, and ever since had been such owner; that notwithstanding such facts the mortgagor, Leyman Pierson, with others, on the 11th day of August, 1884, commenced an action in the Steuben Circuit Court against the appellee Ancil Ward to recover the land described in said mortgage, and such proceedings were thereafter had that said Pierson, on the 11th day of December, 1884, recovered a judgment in said action for the possession of said land; that thereafter, to wit, on the 26th day of September, 1885, and after the execution of said mortgage the appellee Ancil Ward made application and obtained a new

Griswold v. Ward et al.

trial as of right, and thereafter said cause was tried and determined, and it was adjudged that said Leyman Pierson had no title to said land; that at the time of the execution of said mortgage Pierson had no title of record or otherwise to said land other than such as was acquired or derived by said judgment.

To this answer the appellant filed a reply in three paragraphs, the first being a general denial.

The second paragraph alleges that prior to the execution of the note and mortgage sued on, to wit, on the 22d day of August, 1883, Leyman Pierson and others commenced an action in the Steuben Circuit Court against the appellee Ancil Ward to recover the possession of the land described in the mortgage, and that such proceedings were had in that action that on the 11th day of December, 1884, Pierson and others recovered a judgment against Ward for the recovery of said land, and adjudging that said Pierson and others were the owners thereof in fee; that Ward was the sole defendant in that action, and made no motion for a new trial at the term at which said judgment was rendered, nor did he make any such motion until the 26th day of September, 1885, long after the close of said term; that on that day he did make such motion as of right, which was granted; that, on the 23d day of September, 1885, and before the maturity of said note, the appellant, in good faith, and for a valuable consideration, purchased said note from the payees thereof, and they endorsed the same to him and assigned him said mortgage; that he had no notice or knowledge whatever of the litigation over the title to said land, nor did he know that Ward had, or claimed to have, any interest whatever in said land until long after he had purchased said note and mortgage and took an assignment thereof; that while appellee Ward may have been in the constructive possession of the land, he was not in the actual possession thereof, and it was apparently unoccupied, and that appellant had no knowledge of any occupancy of said land at the time he so

Griswold v. Ward et ux.

purchased and took an assignment of said note and mortgage.

The third paragraph of the reply does not materially differ, in legal effect, from the second.

The court sustained a demurrer to the second and third paragraphs of the reply, and the appellant excepted.

The only question for our consideration relates to the propriety of the ruling of the circuit court in sustaining the demurrer to the second and third paragraphs of the reply.

It is contended by the appellant that he is an innocent purchaser within the meaning of section 1066, R. S. 1881, which provides that "The result of the new trial, if application therefor is made after the close of the term at which the judgment is rendered, shall in no case affect the interest of third persons, acquired in good faith, for a valuable consideration, since the former trial," while on the other hand it is contended by the appellees that the facts alleged in the reply do not bring the appellant within the provisions of this statute.

The replies are by way of confession and avoidance, and they confess that the appellee Ancil Ward, at the time the mortgage in suit was executed, was the owner in fee simple of the land therein described, and that Pierson had no title whatever other than that conferred by the judgment, which was vacated when the new trial was granted, and that upon a second trial Ward was adjudged to be the rightful owner of the land.

In avoidance of these facts it is alleged that the appellant purchased the note and mortgage without any notice of the judgment in favor of Pierson against Ward, and in good faith paid a valuable consideration therefor without notice that Ward had or claimed any interest in the land.

It is settled by the decisions of this court that if the appellant had acquired the mortgage in suit with notice of the existence of the judgment in favor of Pierson, he could not claim to be an innocent purchaser, and that he would have

Griswold v. Ward *et ux.*

taken it subject to the right of Ward to defeat it, by taking a new trial as of right, at any time within one year from the date of the judgment. *Smith v. Cottrell*, 94 Ind. 379; *Dunington v. Elston*, 101 Ind. 373; *Brown v. Cody*, 115 Ind. 484.

It is not alleged that the payees of the note who took the mortgage did not have full knowledge of the litigation between Pierson and Ward, but, independent of this omission, we think the replies in question fail to bring the appellant within the provisions of this statute. It is alleged that the appellant had no knowledge of the judgment in favor of Pierson against Ward, and this being true it can not be claimed that he was in any degree influenced to make the purchase by the result of the litigation between these parties. He is in the same situation he would have occupied had there been no judgment. He is in the situation contemplated by the statute, provided he is an innocent purchaser within the ordinary meaning of that term. We think it was intended by the Legislature, in the passage of this statute, that persons who purchased the land or acquired liens thereon under such circumstances as would enable them to hold the land or the lien, as innocent purchasers, in the absence of litigation over the title, should not be affected by the granting of a new trial, provided such purchaser or lien-holder took without notice of the litigation. The Legislature never intended to give a purchaser without notice of the litigation any benefit from the existing judgment which was subject to the right of the party against whom it was rendered to vacate it at any time within the year, but the purpose was to protect such purchaser from the consequences of vacating the same, where he purchased without notice of its existence.

Had Pierson possessed a deed to the land, valid upon its face, backed by a regular chain of title, and Ward had possessed a better title, though not of record, then the appellant would be in a situation to assert that he was an innocent

Goff v. McGee, Treasurer, et al.

purchaser for value without notice, and the granting of a new trial would not have affected his rights acquired before the new trial was granted.

But we have no such case before us. Indeed it is shown that Pierson had no title except such as rested upon his judgment against Ward, which afterward proved to be no title at all. Had appellant acquired his mortgage from Pierson, in the absence of any litigation upon the subject of title, under the showing made here Ward could have quieted his title at any time as against the pretended mortgage lien.

We conclude, therefore, that the appellant is not an innocent purchaser within the meaning of the above statutory provision, and that the court did not err in sustaining a demurrer to the second and third paragraphs of the reply now under consideration.

Judgment affirmed.

MCBRIDE, J., took no part in the decision of this cause.
Filed May 26, 1891.

No. 15,046.

GOFF v. MCGEE, TREASURER, ET AL.

DRAINAGE.—*Repair of Ditches.*—*Surveyor's Assessment*—*Remedy of Aggrieved Person.*—The remedy of a land-owner who complains of an assessment made by the county surveyor, under Elliott's Supp., section 1193 (Acts 1885, p. 141), to reimburse the county treasury for money expended in repairing a ditch, is by appeal to the circuit court from such assessment, and not by a suit to restrain the treasurer of the county from collecting it.

From the Tipton Circuit Court.

J. A. Swoveland and *J. V. Kent*, for appellant.

J. N. Waugh, *J. P. Kemp*, *G. H. Gifford* and *J. M. Fippen*, for appellees.

MILLER, J.—This was an action by the appellant to re-

Goff v. McGee, Treasurer, *et al.*

strain the appellee, as treasurer of Tipton county, from collecting an assessment made against the lands of the appellant for the repair of a drain.

It appears from the complaint that a public drain was constructed in the year 1882 in pretended accordance with the provisions of the act which went into effect September 19th, 1881 (R. S. 1881, section 4285, *et seq.*); that in the year 1886 the county surveyor caused the drain to be repaired, and made the assessment complained of upon the lands of the plaintiff, and others, to reimburse the treasury of the county for the money expended in making the repairs.

The objections to the assessment pointed out in the complaint are as follows:

1. That the ditch, for the repair of which the assessment was made, was never granted or established by the board of county commissioners, or by any other competent court.

2. That the viewers appointed by the board of commissioners reported that the slope of the banks of the proposed ditch should be constructed at an angle of $37\frac{1}{2}$ degrees, and that after the report had been spread of record, some person, without authority to do so, erased from the report the figures " $37\frac{1}{2}$ " and wrote in place of the same the figures "45" as the angle of the slope.

3. That the surveyor did not, prior to the making of the assessment for the repair of the ditch, or since that time, make any record of the assessment.

4. That the ditch was not repaired at an angle of either $37\frac{1}{2}$ or 45 degrees; nor was it repaired its entire length, but was in places cut materially wider and deeper than called for in the specifications in the petition for its establishment.

The complaint was held good on demurrer, issues of fact were joined, and the cause submitted to the court for trial, who found for the defendant. A motion for a new trial was filed and overruled.

The appellant insists that the finding of the court was not sustained by the evidence, and, also, that the court erred in

Goff v. McGee, Treasurer, *et al.*

excluding evidence offered by the appellant, which was competent and material under the issues.

The view we entertain of the law of this case renders it unnecessary for us to examine in detail the various questions relating to the admissibility of evidence contained in the record.

In making the assessment complained of, the surveyor was evidently proceeding under section 1193, Elliott's Supp. (Acts 1885, p. 141), which provides that any person aggrieved may appeal to the circuit court from such assessment.

This section came before this court for construction in *Kirkpatrick v. Taylor*, 118 Ind. 329, which was an action to enjoin the collection of an assessment made by the county surveyor to reimburse the treasury for money paid out in repairing a ditch; the conclusion arrived at by the court is stated in this language:

"As to the adequacy of plaintiff's remedy on appeal, the statute provides: 'The only question tried shall be to determine the costs of such repair and what amount thereof should be assessed against the appellant's lands.' Upon such appeal it is certainly proper, and within the scope and meaning of the statute, to determine whether the appellant's lands were subject to any assessment for such repairs, and whether there should be any part of the costs assessed against such lands. It could not be determined what amount should be assessed against the lands without determining whether any part should be so assessed."

It is admitted in the complaint that the appellant had notice of the assessment at the time it was made, and no reason is given for his failure to avail himself of this right of appeal. To the same effect see *Bunnell v. Peet*, 123 Ind. 436; *Markley v. Rudy*, 115 Ind. 533, and cases cited. We are satisfied with the ruling of these cases, and, therefore, find no error in the record.

Judgment affirmed.

Filed May 26, 1891.

Robinson v. State, *ex rel.* Powers.

No. 15,073.

ROBINSON v. STATE, EX REL. POWERS.

BASTARDY.—*Still-born Child.*—*Institution of Suit Before Birth.*—*Rendition of Judgment After Death.*—Where a prosecution for bastardy is commenced before the birth of the child, the law recognizes the existence of the child sufficiently to authorize the prosecution, and its subsequent death, whether *in utero* or after birth, will not abate the action. Section 997, R. S. 1881. The court is authorized in such a case to give judgment for such sum as shall be deemed just, and the judgment may be rendered after the death of the child. *Canfield v. State, ex rel.*, 56 Ind. 168, distinguished.

From the Knox Circuit Court.

J. S. Pritchett and *H. Burns*, for appellant.

MCBRIDE, J.—This was a bastardy proceeding, commenced October 3d, 1888, the relatrix alleging that she was pregnant with a bastard child, and that appellant was its father. The appellant appeared before the justice and admitted that the relatrix was pregnant, and that he was, as alleged, father of the child. In the circuit court, however, he filed an answer of general denial, and there was a trial by jury, resulting in a finding against him. Judgment was not rendered against him until June, 1889. The child was born dead April 17th, 1889.

Judgment was rendered against him for \$100. Appellant insists that this was erroneous, and that the court had no power, in such case, to render judgment for anything but the costs of the prosecution. His contention is that, the judgment in such cases being rendered only to secure the maintenance and education of the child, and the child being still-born, nothing could be due for its maintenance or its education. He further insists that a still-born infant is not a child within the meaning of the statute; that, being still-born, it never had an existence separate and apart from its mother. In this he claims that he is supported by the case of *Canfield v. State, ex rel.*, 56 Ind. 168. That case does not support ap-

pellant's contention. That was a prosecution in which the relatrix alleged she had been delivered of a bastard child. The evidence showed that the child was still-born, that its lungs were never inflated, and that the prosecution was commenced after the birth of the child. The court held that the proof did not sustain the averment of the complaint that the relatrix "had been delivered of a bastard child"; that, never having breathed, it had never lived; that until a child is wholly born, and has obtained a separate existence, it is but a *fœtus in utero*, and not a human being within the meaning of the law *authorizing proceedings for the maintenance of bastard children after their birth*. It is evident, we think, that if the prosecution in that case had been commenced before the birth of the child the court would have reached a different conclusion. *Canfield v. State, ex rel., supra*, was decided at the May term, 1877, of this court. The case of *Evans v. State, ex rel.*, 58 Ind. 587, was decided at the November term, 1877, by the same court, there having been in the meantime no change in the *personnel* of the court. In that case the facts were substantially as in the case at bar.

The prosecution was commenced before the birth of the child. After verdict, but before judgment; the child was born dead. The court adjudged that the defendant should pay the relatrix \$100. The judgment was affirmed. The statute authorizes the institution of proceedings of this character before the birth of the child, and they may be prosecuted to final judgment before the child is born. The existence of the child is thus recognized by the law at that time, although it is but a *fœtus in utero*.

Section 997, R. S. 1881, provides that "The death of a bastard child shall not be cause of abatement or bar to any prosecution for bastardy; but the court trying the same shall, on conviction, give judgment for such sum as shall be deemed just."

It will be observed that this section, while authorizing the

Scruggs *et al.* v. Reese *et al.*

court in such case to render judgment for such sum as in its discretion may be deemed just, says nothing about the maintenance or education of the child.

There is no conflict between the two cases.

Where the relatrix delays commencing the prosecution until after the birth of the child, she must then allege and prove the birth of a child which had an existence separate and apart from her.

When the prosecution is commenced before the birth, the law recognizes the existence of the child sufficiently to authorize the prosecution, and its subsequent death, whether *in utero* or after birth, brings the case within the provisions of section 997, *supra*.

The court was thereupon authorized to give judgment for a reasonable sum, and we can not say it abused its discretion in this case.

Judgment affirmed.

Filed May 26, 1891.

No. 15,050.

SCRUGGS ET AL. v. REESE ET AL.

DRAINAGE.—Straightening Watercourse.—Drainage Commissioners.—Jurisdiction.—Under the statutes of this State, authority is given to drainage commissioners to alter or change the channel of watercourses only when, as expressed in the act, it is a "method of drainage." Acts 1885, p. 129. The primary object of the statute is the reclamation of wet lands, and the power to alter and straighten watercourses is a mere incident, and only to be exercised when it becomes necessary to promote drainage. A proceeding to establish a drain where the primary purpose is to straighten a watercourse, and the drainage a mere incident, is not within the jurisdiction conferred upon the circuit court by the above act.

From the Morgan Circuit Court.

128	399
154	120
128	399
160	604
128	399
163	937

Scruggs et al. v. Reese et al.

W. S. Shirley, C. G. Renner and F. P. A. Phelps, for appellants.

J. S. Newby, for appellees.

MILLER, J.—This is an appeal from a proceeding for the establishment of a drain.

The appellees filed their petition in the Morgan Circuit Court, and procured the drain under and pursuant to the act of April 6th, 1885 (Acts 1885, p. 129). The appellants were remonstrants. The objection to the proceeding presented in the briefs of counsel relate exclusively to the jurisdiction of the court. This objection was made in the circuit court on motion to dismiss and as a cause of remonstrance.

The petition describes the drain proposed to be constructed as beginning at a designated point and "running thence north, or as nearly north as practicable, about ninety rods, to intersect the channel of White river, and thereby change said White river by straightening the same."

The drain is described in the report of the commissioners and order of the court as commencing at a point in the present bottom of White river and extending thence seventeen hundred feet north, and opening upon said river, at which point a break-water three hundred feet in length was to be constructed across the river.

The evidence introduced at the trial shows, without dispute, that the purpose of the ditch or drain was to straighten the course of the river, or at least to carry off a portion of the water at times of flood, and to prevent the river cutting a new channel.

The evidence of the commissioners shows that the assessments were upon the lands not in proportion to the benefits they would receive on account of their drainage, but in proportion to estimated danger of their being injured by the threatened new channel. One of the drainage commissioners says in his testimony:

"We made the estimates upon the lands from the danger

of the river cutting the new channel through the lands and overflowing them. The new channel will not prevent overflow in times of high water, but will shorten the river, and thus take the water off faster and draw the current off from where it now flows, and the greater volume of water will follow the channel, and lessen the quantity of overflow as it now is."

The appellant contends that, as the primary object of the improvement was the straightening of the river, and the drainage a mere incident, the whole proceeding was without the jurisdiction conferred upon the circuit court by the act approved April 6th, 1885. Elliott's Supp., section 1184.

The appellees do not deny that the purpose of the drain was to straighten the river, but claim that jurisdiction is given the circuit court by the following clause in section 3 of this act, viz.:

"They may determine that the method of drainage shall be by removing obstructions from a watercourse by deepening, widening, straightening or changing its channel, by constructing an artificial channel, ditch or drain, open or covered, by making levees, or by any or all of such methods combined."

In ascertaining the probable legislative intent in the enactment of this clause, it is instructive to note the course of legislation upon this subject. We accordingly find that substantially the same provision is contained in the act of 1881, R. S. 1881, section 4275, and in the act of 1883. Acts 1883, p. 176, section 3.

It follows that if this act gives the court jurisdiction to change and straighten the channels of watercourses where drainage is a mere incident, such jurisdiction has existed since April 8th, 1881.

We also find that on March 8th, 1883, an act was passed expressly authorizing boards of county commissioners to straighten or change the course, direction or location of the

Scruggs et al. v. Reese et al.

channel of any stream of water, and declaring an emergency for the immediate taking effect of the act. Acts 1883, p. 192.

The provisions of this act, although similar in some respects to the drainage act, are essentially different. If full jurisdiction had been given the circuit court to change, alter and straighten the channel of streams, it is difficult to determine what useful purpose was to be accomplished in the enactment of the later act.

We are of the opinion that authority is given drainage commissioners to alter or change the channel of watercourses only when as expressed in the act it is a "method of drainage;" that the primary object of the statute is the reclamation of wet lands, and the power to alter and straighten watercourses is a mere incident, and only to be exercised when it becomes necessary to promote drainage; and that the act of March 8th, 1883, gives to the boards of county commissioners exclusive jurisdiction to straighten or change watercourses to protect the banks of the stream, where the change of the channel is the primary object to be accomplished, although, incidentally, lands subject to overflow may be benefited thereby.

The case of *Lipes v. Hand*, 104 Ind. 503, is not inconsistent with, but rather tends to support this position. In that case, although the fact is not set out in the opinion, it was necessary, in order to properly drain wet lands, and to furnish outlets for drains, that the channel of Eel river should be improved, and this it was held might be done under the drainage act.

While it is true that the drainage act is to be liberally construed to promote the drainage of wet or overflowed lands, its provisions will not be extended to accomplish purposes foreign to the object for which it was enacted.

The act of March 8th, 1883 (Acts of 1883, p. 173), provided that a drain might be established where it would benefit the streets of a town or city, notwithstanding which it

Romaine v. Judson et al.

was held that the circuit court had no jurisdiction to order the construction of a drain within the corporate limits of a city. *Anderson v. Endicutt*, 101 Ind. 539.

In our opinion the power to straighten or change the location of the channel of any stream or body of water, to prevent the banks from washing or cutting by the flow of water, is as much within the exclusive jurisdiction of the boards of county commissioners as the construction of drains within the limits of a city is within the exclusive jurisdiction of the common councils of such cities.

The judgment is reversed, with costs, and the court directed to sustain the motion to dismiss the proceedings for want of jurisdiction.

Filed May 26, 1891.

No. 14,711.

ROMAINE v. JUDSON ET AL.

128	403
159	4
159	610

PARTIES.—*Action by Ward After Attaining Majority.—Contract for His Benefit.*

—*Necessary Parties.*—A. was indebted to plaintiff upon certain notes payable to his guardian, representing the balance of purchase-money for a stock of goods belonging to the ward and purchased by A. Thereafter A. sold said stock of goods to the defendants, who each agreed to pay said notes, and jointly also promised to do so, and relieve A. from all legal responsibility in the payment of the same. The ward, when he attained his majority, settled with his guardian, and in the settlement said notes were transferred to him. He brought suit against the defendants on the contract entered into between them and A. in reference to the payment of said notes.

Held, that the defendants could be sued jointly.

Held, also, that A. was not a necessary party to said action, the complaint not seeking to affect or change in any way his rights as fixed by the contract entered into between him and the defendants.

SAME.—*Pleading.—Answer.—Rescission of Contract Before Acceptance.—Written Agreement.—Parol Agreement in Contravention of.*—A paragraph of answer in such an action pleading a rescission of the contract before any acceptance of it by the plaintiff or his guardian for him, states a good

Romaine v. Judson et al.

defence, but a paragraph of answer pleading a parol agreement in contravention of the written agreement is bad.

SAME.—Answer.—Contract.—Plea of Mutual Mistake.—Fraud.—Reformation of Contract.—Misrepresentations of Law.—A paragraph of answer in such an action which alleges a mutual mistake in the contract, and seeks to have it reformed, is good, as is also a paragraph which alleges that the defendant was induced by fraud to accept the bill of sale containing said contract, setting up the facts as to what the true contract was, and the fraudulent representations and deceit by which he was induced to accept it, and asking for its reformation. A paragraph is bad which alleges misrepresentations as to the law, and the necessity for a written contract, and as to the legal effect of the contract in question.

From the Elkhart Circuit Court.

H. C. Dodge, for appellant.

W. L. Stonex and E. E. Mummert, for appellees.

OLDS, C. J.—In March, 1884, the appellant was a minor and Edmund R. Kerstetter was his guardian. At said date said guardian sold a stock of goods belonging to said ward to Levi W. Deitch, and as part of the purchase-money said Levi W. Deitch executed to Kerstetter two promissory notes, one for two hundred and fifty dollars and one for five hundred dollars. Said notes were signed by Levi W. Deitch and Henry Deitch. In November, 1884, said Levi W. Deitch sold said stock of goods to defendants, John L. Judson and Henry Deitch. At the time of the sale Levi W. Deitch executed to said Judson and Henry Deitch a bill of sale for said stock of goods, in which it was stipulated that the consideration therefor was to be "the payment by Henry Deitch of one note of two hundred and fifty (\$250) dollars, payable to E. R. Kerstetter, guardian; also of one note of five hundred (\$500) dollars, held by E. R. Kerstetter, guardian," etc., describing other notes; "and the payment by John L. Judson of one note of five hundred (\$500) dollars, payable to E. R. Kerstetter, guardian, and one note of two hundred and fifty (\$250) dollars, payable to E. R. Kerstetter, guardian. The notes aforesaid are signed, the first by Levi W. Deitch and Henry Deitch, the second by Levi W. Deitch

Romaine v. Judson et al.

and John L. Judson." Then follows the following stipulation: "Said Henry Deitch and said John L. Judson do, well and truly, agree to pay the aforesaid notes and relieve the said Levi W. Deitch from all legal responsibility in the payment of the same," etc.

After the execution of the bill of sale containing the agreement above set out, the appellant arrived at the age of majority and settled with his guardain, and in the settlement the notes were transferred to and became the property of the appellant, and he brings this suit against the appellees on the contract in the bill of sale transferring the property to them.

The complaint is in three paragraphs. The first and third paragraphs are to recover the amount of the note given for two hundred and fifty dollars, and the second is to recover the amount of the note given for five hundred dollars.

The appellees demurred to each paragraph of the complaint, for want of facts, and for a defect of parties defendant, in that Levi W. Deitch was not made a party defendant, which demurrers were overruled, exceptions reserved, and the ruling assigned as cross-error. As the validity of the complaint is material in passing upon the errors which are to be hereafter considered, we deem it best to consider the cross-error first.

It is first urged that the complaint is bad, for the reason that the contract is a joint and several one in so far as the appellees are concerned; that the agreement is that appellee Deitch will pay certain notes, and that Judson will pay certain other notes, as stated in the first part of the contract, and that they can not be sued jointly for the notes. We do not think the contract bears the construction contended for by the counsel for the appellees. The contract contains an express agreement, on the part of both the appellees, to pay the notes, and to relieve the said Levi W. Deitch from all legal liability for the payment of the same; while it is stip-

Romaine v. Judson *et al.*

ulated in the first part of the contract that each is to pay certain notes, it concludes by a joint promise on the part of both appellees to pay all of the notes. As between the two appellees a different liability may exist. But we are not dealing with the question of their liability to each other; nor do we deem Levi W. Deitch a necessary party defendant. It is a contract for the benefit of the appellant, and he is the real party in interest. The complaint seeks to enforce the contract as made, and in no way to affect or change the rights of Levi W. Deitch, as fixed by the contract. Appellant is seeking only to take the benefit of the contract as made. To enforce the contract as made by Levi W. Deitch for appellant's benefit, the benefits derived from such enforcement inure to the benefit of the said Levi W., as it results in the payment of a debt for which he is liable. If the interests of Levi W. were to be in any way affected, or changed from that stipulated in the contract, then he would be a proper, if not a necessary, party. In the case of *Powers v. Fletcher*, 84 Ind. 154, it was held that where one partner agreed with the other to pay the debts of the firm, on dissolution, that in a suit by a creditor, on the contract, against the partner agreeing to pay the debts, the other partner was not a necessary party defendant, and that is the same question presented in this case. The firm was indebted to a third person; one of the partners entered into a contract with the other for the benefit of the creditor, by which one of the partners was to pay the debt. The creditor takes the benefit of the contract, and sues the partner agreeing to pay, not making the other partner a party. In this case Levi W. Deitch was indebted to the appellant upon a note payable to his guardian; said Levi W. makes a contract for the benefit of the appellant with the appellees, whereby the appellees agree to pay the debt, and appellant brings this suit against the appellees on the contract, to enforce the contract as written, and Levi W. is not a necessary party to the action upon the complaint.

The appellee Judson filed an amended answer and cross-complaint in eight paragraphs.

The first is a general denial.

The appellant demurred to each paragraph of answer except the first. The demurrer was sustained as to the second and seventh, and overruled as to the others; exceptions were reserved, and errors assigned in overruling the demurrer as to each.

The third paragraph of answer we think pleads a rescission of the contract before any acceptance of it by the appellant or his guardian for him, and there was no error in overruling the demurrer to it.

The fourth paragraph of answer pleads a parol agreement in contravention of the written agreement.

It is clearly bad, and the demurrer should have been sustained to it.

The fifth paragraph is in the nature of a counter-claim or cross-complaint. It alleges a mutual mistake in the contract, and seeks a reformation of the contract.

It is suggested that this paragraph is bad, for the reason that Levi W. Deitch is not a party to it, but it is not demurred to for this reason, and hence no question as to defect of parties is presented. The paragraph we think states facts sufficient to constitute a defence.

The sixth paragraph alleges misrepresentations as to the law and the necessity for a written contract, and as to the legal effect of the contract in question. The demurrer should have been sustained to it.

The court erred in overruling the demurrer addressed to this paragraph.

The eighth paragraph of answer is addressed to the third paragraph of the complaint, and alleges that said appellee was induced by fraud to accept said bill of sale containing said contract, setting up the facts as to what the true contract was, and the fraudulent representations and deceit by

Romaine v. Judson et al.

which he was induced to accept it, and asking a reformation of the contract.

The facts stated in this paragraph are sufficient to entitle the defendant to a reformation of the contract, and to avoid his liability for the amount of the note. The demurrer was properly overruled.

There is no question presented as to the necessity of making Levi W. and Henry Deitch parties to this paragraph. The paragraph is more than an answer; it seeks affirmative relief.

For the errors of the court in overruling the demurrers to the fourth and sixth paragraphs of answer the judgment must be reversed.

The other questions presented may not arise on a re-trial of the case.

Judgment reversed, at the costs of the appellees, with instructions to sustain the demurrer to the fourth and sixth paragraphs of answer.

Filed Jan. 29, 1891.

ON PETITION FOR A REHEARING.

OLDS, J.—As we interpret the peculiar phraseology of the reasons given by counsel in this petition for rehearing, this rehearing is asked on account of the alleged error of the court in holding the fourth and sixth paragraphs of answer bad.

As to these paragraphs of answer in the original opinion we said:

“The fourth paragraph of answer pleads a parol agreement in contravention of the written agreement. It is clearly bad, and the demurrer should have been sustained to it.”

We thought this statement sufficient in passing upon a paragraph of answer so clearly bad. The contract referred to is a contract for the sale of a certain stock of goods by Levi W. Deitch to Henry Deitch and John L. Judson. The consideration for the sale is the payment of certain notes. The

Romaine v. Judson *et al.*

sale and transfer of the goods is a sale and a transfer to Henry Deitch and John L. Judson jointly, and an agreement on their part as follows :

“Said Henry Deitch and said John L. Judson do well and truly agree to pay the aforesaid notes to relieve the said Levi W. Deitch from all legal responsibility in the payment of the same. Said Levi W. Deitch does sell, convey and set over to the said Henry Deitch and John L. Judson for their own use and purposes the above described property.”

In the contract prior to the description of the property, these words are used : “Has bargained and sold to Henry Deitch, of Elkhart county, and State of Indiana, and to John L. Judson, of Elkhart county, and State of Indiana, the goods and chattels described as follows, to-wit :” These are the only words of bargain and sale. It is true, in the first part of the contract there is a separate statement that each of the parties agrees to pay certain notes, describing them, but the sale by the contract is a sale to Deitch and Judson, jointly, and a joint agreement on their part to pay the notes, and save Levi W. Deitch harmless, and so far as their liability to Levi Deitch is concerned they are each bound for the payment of all the notes and to protect and save Levi W. Deitch harmless. There is no ambiguity in the language used. And in the fourth paragraph of answer the appellee Judson pleads a parol contract in contravention of this contract as a defence to their written contract and in avoidance of his liability. That this can not be done is too plain to admit of discussion, hence we disposed of it very briefly in the original opinion.

As to the sixth paragraph counsel discuss a different proposition from the one presented by the pleading. The question presented by the pleading is the one briefly stated and disposed of in the original opinion, and the paragraph of answer is bad.

Petition for rehearing is overruled.

Filed June 10, 1891.

Cook *et al.* v. McNaughton.

No. 14,311.

COOK ET AL. v. MCNAUGHTON.

128	410
133	119
128	410
146	561
128	410
152	394

VERDICT.—*Special.*—*Defects in.*—*Waiver.*—Where a special verdict finds all the facts necessary to support a judgment, but is defective in finding generally as to one issue instead of specially, if the verdict is received without objection, and no motion for a *venire de novo* or a new trial is made, the defect is waived.

PROMISSORY NOTE.—*Consideration.*—*Special Verdict.*—The defendant executed his promissory note as a part of a private subscription of \$30,000 to secure the extension of a line of railroad. It was found impossible to raise said \$30,000. The special verdict showed that the defendant agreed that the note should be used to make up a subscription of \$7,500; that afterwards it was delivered to a bank under said agreement, and that the defendant acquiesced in such delivery and agreed to pay it, upon the faith of which the other subscribers to the fund acted. The consideration for which the note was executed, namely, the extension of the line of railway, appeared on its face. The extension was made. *Held*, that the note was shown by the special verdict to have been executed for a valid consideration.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellants.

J. H. Baker and *F. E. Baker*, for appellee.

COFFEY, J.—This was a suit in the Elkhart Circuit Court by the appellants against the appellee, upon the following promissory note, viz.:

“\$300. ELKHART, IND., Jan. 17th, 1831.

“I promise to pay to the treasurer of the Cincinnati, Wabash and Michigan Railway Company, or order, three hundred dollars, value received, without relief from valuation or appraisement laws, with interest after maturity at 8 per cent. until paid, and attorney fees.

“This note is given in consideration of the construction by said railway company of an extension of its railway from Goshen, Indiana, to connect with the Chicago and Grand Trunk Railway, and is to be paid at the end of thirty days after such extension is so far completed as to admit of the

Cook et al. v. McNaughton.

running of a train of cars over the same from Goshen, Indiana, to said Chicago and Grand Trunk Railway, and upon condition that such extension is so constructed on or before the first day of January, 1883; and is payable on the further condition that the extension is constructed through the city of Elkhart; and upon or near one of the two surveys made through said city in August, 1880, by said company, and upon the condition that said extension shall reach the main embankment of the Elkhart Hydraulic Company, of Elkhart, Indiana, either by the main track, or side track, of said railway company; right of way through said hydraulic company's land being furnished free of cost to said company.

"If the above terms and conditions are observed and performed by said railway company, then this note shall be paid as herein above specified, otherwise the said note shall be void. And provided that said R. R. is built by Edwardsburgh, or Granger station.

"Signed :

JOHN MCNAUGHTON."

The complaint alleges that the railroad company performed all the conditions of said note on its part, and afterwards sold and endorsed said note to the appellants.

Among other answers filed by the appellee was an answer under oath denying the execution of the note in suit, one under oath denying the endorsement of the note to the appellants, and another averring that said note was executed without any consideration.

Upon issues formed the cause was tried by a jury, who returned the following special verdict :

"John Cook *et al.* vs. John McNaughton. Special Verdict Submitted by Plaintiffs :

"1. We, the jury, find that in order to induce the Cincinnati, Wabash and Michigan Railway Company to build its line from the city of Elkhart to a connection with the Chicago and Grand Trunk Railway Company, certain residents of the said city of Elkhart, including the plaintiffs and defendant, agreed with said railway company to raise and pay to it the sum of

Cook et al. v. McNaughton.

\$30,000, if possible so to do, in lieu of taxation of that amount for said purpose, the question having been before the people and voted down; that said residents, including the plaintiffs and defendant, proposed to raise said sum by private subscription; that, to carry out said proposition, the paper sued upon was signed by the defendant and left with one F. W. Miller to be delivered to said company when notes to the amount of \$30,000 should be raised and delivered for the same purpose; that after several thousand dollars were so raised, it was found to be impossible to raise said \$30,000, and said project was abandoned, and the committee having the matter in charge ordered said notes to be returned to the signers, including the note now sued upon.

"2. We further find that a number of the citizens of said city then proposed, if possible, to raise the sum of \$22,500 by taxation and \$7,500 by private subscription for the purpose aforesaid; that the committee having such matter in charge delegated Mr. Maxon, plaintiff herein, to circulate a subscription paper binding those who signed it who had given notes upon the first proposition to raise the \$30,000, to pay them on the new proposition to raise \$7,500.

"3. We further find that many of those who had signed notes to be applied on said \$30,000 signed said subscription paper, and the aggregate amount so signed was \$2,034.60, but said subscription paper was never presented to or signed by the defendant.

"4. We further find that said Maxon saw defendant McNaughton, who promised to pay his said original note—the note now sued upon—towards said new subscription of \$7,500; that upon the strength of such promise said Maxon went to said F. W. Miller and got the note now sued upon and left it at the First National Bank in said city of Elkhart.

"5. That afterwards said citizens appointed a committee to see about getting the right of way for said railway company, of which the plaintiffs and defendant were members,

and one E. C. Bickel was employed to negotiate for such right of way ; said Bickel reported to said committee that he could negotiate to better advantage if he had the cash to pay down. A proposition was then made to the committee to try and get those who had subscribed to the fund to pay their notes before they were due, and raise money at once for that purpose ; the chairman of that committee asked the several members present if they would pay their notes then ; he also said to defendant McNaughton, ' Will you pay your note ? ' to which the defendant said, ' I suppose I can borrow the money and pay it.'

" 6. We find that the defendant by such language intended that those present should understand that he would pay said note, and that those present did so understand him, and acted upon such understanding, and paid their notes a short time thereafter.

" 7. We further find that said sum of \$22,500 was raised by taxation and paid over to said railway company, as proposed.

" 8. We further find that upon the strength of defendant's promise said committee went to said bank and got the note now sued upon and delivered it to the said Bickel, who was acting as the agent of said committee and also of said railway company, and he presented it to said defendant for payment, which he refused.

" 9. We find that after all the money which was collectible on said other notes and subscription had been collected and paid to said railway company it lacked about \$453 of being enough to make up said \$7,500, and these plaintiffs and some others raised the balance and paid it over to said railway company, which by its treasurer duly endorsed said note and delivered the same to the plaintiffs' attorney.

" 10. We also find that all the conditions and stipulations contained in said note were fully performed by said railway company at least thirty days before the first day of January,

1883, all of which was well known to the defendant before this action was brought.

" 11. We find that the amount of principal and interest due upon said note, if anything, is \$414.

" 11a. We further find that since the note sued upon was endorsed to plaintiffs, they have collected from other subscriptions about \$550, but not enough to pay all claims outstanding on account of said subscriptions.

" 12. If upon the foregoing facts the law be with the plaintiffs, then we find for them, and assess their damages at \$414.

JOHN A. SMITH, Foreman."

Upon this verdict the court rendered judgment for the appellee, overruling a motion by the appellants for judgment in their favor on said verdict.

The first objection urged by the appellee to this verdict is that it is not sufficient to support a judgment in favor of the appellants, because there is no finding of facts showing the performance of the conditions precedent contained in the note in suit. The argument is that it is not sufficient for the special verdict to follow the language of the complaint, but that it should contain a finding of the facts relating to each condition from which the court could say, as a matter of law, that the payee of the note had complied with the conditions.

A special verdict must contain all such facts as are essential to a recovery. Its office is to state the facts proved, and all beyond that is unauthorized; and a failure to find any fact necessary to a recovery is equivalent to a finding against the party having the burden of the issue. If it contains conclusions of law such conclusions must be disregarded. Recitals of evidence will also be disregarded. Nothing will be taken by intendment. *Stropes v. Board*, etc., 72 Ind. 42; *Kealing v. Vansickle*, 74 Ind. 529; *Stumph v. Bauer*, 76 Ind. 157; *Henderson v. Dickey*, 76 Ind. 264; *Woodfill v. Patton*, 76 Ind. 575; *Jarvis v. Banta*, 83 Ind. 528; *Hessong v. Pressley*, 86 Ind. 555; *Pittsburgh, etc., R. R. Co. v. Spencer*, 98

Cook *et al.* v. McNaughton.

Ind. 186; *Conner v. Citizens Street Railway Co.*, 105 Ind. 62; *Louisville, etc., R. W. Co. v. Balch*, 105 Ind. 93; *Buchanan v. Milligan*, 108 Ind. 433; *Western Union Tel. Co. v. Brown*, 108 Ind. 538.

It does not follow from these premises, however, that the verdict before us is too defective, in the respects now under consideration, to authorize a judgment for the appellants. The finding is that the payee of the note in suit fully performed all the conditions and stipulations contained therein.

If it be conceded that the question as to whether the conditions were complied with was a mixed question of law and fact, still the finding necessarily includes all the facts which would be involved in a performance of the conditions. Rejecting so much of the finding as involves the conclusions of law, there still remains a general finding of the facts which constitute a performance. It is true that the facts, instead of being found specially, are found generally; and it is also true, perhaps, that the appellee, had he insisted upon it, would have been entitled to a more specific finding. Had the jury been instructed to return a special verdict, and instead thereof had returned a general verdict for the appellants, which had been received by the court without objection from the appellee, he could not now be heard to say that the court should render judgment in his favor over the general verdict, treating it as a nullity. In such case he would have had the legal right to object to the acceptance of a general verdict and insist upon a new trial, and would have had the right to a special finding of the facts. So, in this case, if the appellee was not satisfied with the general finding of the facts upon the question of performance of the conditions contained in the note in suit, he had the right to object to the verdict in its present condition. Failing to do so, we are constrained to hold that he waived his right to a more specific finding of the facts, and can not be permitted to say now that the court should treat the general finding as a mere

Cook et al. v. McNaughton.

nullity. To hold otherwise would be to adopt a rule which, instead of securing to the parties their legal rights, would, in many cases, defeat the ends of justice.

It is next contended by the appellee that the judgment of the circuit court is right, because the verdict does not find a valid execution of the note in suit, and because it is not upheld by any valid consideration.

We can not agree with the appellee in this contention. The special finding shows, as we understand it, that the appellee agreed that the note should be used to make up the \$7,500 subscription. After it was delivered to the bank, under that agreement, he acquiesced in such delivery, and agreed to pay it, upon the faith of which the other subscribers to that fund acted. The note, upon its face, expresses the consideration for which it was executed, namely: the extension of the line of the Cincinnati, Wabash and Michigan Railway so as to connect with the Chicago and Grand Trunk Railway. This was done. It thus appears that the appellee has received the full consideration for which he executed the note in suit.

The case of *Catlett v. Trustees, etc.*, 62 Ind. 365, is not in point here, as that was a mere donation made on Sunday, without any subsequent ratification.

In our opinion the verdict before us is sufficient to warrant a judgment in favor of the appellants, and that the court erred in overruling their motion for judgment on said verdict.

Judgment reversed, with directions to sustain the motion of the appellants for judgment in their favor on the special verdict of the jury.

MITCHELL, J., took no part in the decision of this cause.
Filed May 14, 1890.

ON PETITION FOR A REHEARING.

COFFEY, J.—An earnest petition for a rehearing has been filed in this cause, and an able brief filed by counsel, in which it is insisted that the court erred in holding that the special

Cook *et al.* v. McNaughton.

finding, set out in the opinion, was sufficient to warrant a judgment in favor of the appellants. It is claimed that the opinion is in conflict with the cases of *Goldsby v. Robertson*, 1 Blackf. 247; *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Dixon v. Duke*, 85 Ind. 434; *Louisville, etc., R. W. Co. v. Balch*, 105 Ind. 93; *Conner v. Citizens Street R. W. Co.*, 105 Ind. 62; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Buchanan v. Milligan*, 108 Ind. 433; *Western Union Tel. Co. v. Brown*, 108 Ind. 538; *Louisville, etc., R. W. Co. v. Flanagan*, 113 Ind. 488; *Louisville, etc., R. W. Co. v. Hart*, 119 Ind. 273.

We have given each of these cases a careful consideration, and have reached the conclusion that they do not in any manner conflict with the conclusion heretofore reached in the case at bar.

They each support the conclusion reached by the court in this case in so far as it holds that the verdict under consideration is defective as a special verdict, but none of them lends any support to the contention of the appellee in this case.

It is conceded by the appellants that the verdict, as a special verdict, is defective in finding generally on one of the issues in the cause instead of finding the facts in detail, but the controversy between the parties relates to the remedy for such defect, the appellants contending that unless the appellee seeks, in some legitimate mode, to set aside the verdict, the defect is waived; while the appellee contends that the verdict should be treated as though the general finding on this issue was no finding at all.

It is firmly settled by the cases above cited that where the jury find matters of law only, such finding will be ignored, for in case of a special verdict it is the province of the court to deal with the law, and where the jury undertake to usurp the functions of the court, to the extent they do so their action will be treated as a nullity. But where the jury, acting within their special province, find a fact, though the

Cook *et al.* v. McNaughton.

fact be imperfectly stated in the verdict, the authorities cited do not support the position that the court will treat the finding of fact as a nullity, and render judgment as if no such fact had been found.

In the case of *Goldsby v. Robertson*, *supra*, this court, of its own motion, ordered the verdict set aside. In the case of *Pittsburgh, etc., R. R. Co. v. Spencer*, *supra*, a *venire de novo* was granted.

In the case of *Louisville, etc., R. W. Co. v. Balch*, *supra*, the jury returned a special verdict into which was injected a general verdict. The appellant in that case objected to the reception of the general verdict, and also moved to strike it out. It also objected to a discharge of the jury until they should render a more perfect special verdict. These objections being overruled, the appellant moved for a *venire de novo*, which was overruled.

In relation to the questions thus raised this court said: "We think that the court clearly erred in refusing to require the jury to perfect their special verdict, and in overruling appellant's motion for a *venire de novo*."

In some of the cases cited, where a statement in the special verdict consisted of a mere conclusion of law, it was ignored, and in some a new trial was granted, but in none of them was the statement of a fact treated as a nullity because it was imperfectly stated.

In 3 Graham and Waterman New Trials, p. 1418, the discussion of the subject of special verdicts is opened with the following language: "A special verdict which does not find the material facts in detail, can not be supported as such; it must be set aside, and a new trial awarded."

In this case the special verdict was received without objection. No effort was made to have the jury correct it; no motion was made for a *venire de novo*. The appellant does not seek a new trial, but seeks to treat a general finding on one issue in the case as a nullity.

He insists that the finding in question is a statement of a

Cook *et al.* v. McNaughton.

mere conclusion of law, and therein, we think, consists the error in one of the premises from which he draws his conclusion. The doctrine that a general verdict for a plaintiff embraces a finding in his favor of all the material allegations in the complaint is elementary. So we think the general finding for the appellant on one issue embraces all the facts involved in that issue.

The defect in the special verdict under consideration does not consist in a failure to find all the facts necessary to authorize a judgment for the appellant, but it consists in finding the facts as to one issue generally and not specially. As the appellee has not sought to have the verdict set aside for this defect it is our duty to give it force, if that can be done.

“‘The court will work the verdict into form and make it serve.’ For verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided unless from necessity, originating in doubt of their import, or immateriality of the issue found, or their manifest tendency to work injustice.” 1 Graham and Wat. New Trials, 160; *Chambers v. Butcher*, 82 Ind. 508.

As all the parties are content to permit this verdict to stand in its present condition, and as it is not defective in failing to find any facts necessary to a recovery by the appellants, we think the court should sustain the motion of the appellants for judgment in their favor, and that the petition for a rehearing should be overruled.

Filed June 9, 1891.

Lane v. Boicourt.

No. 15,079.

LANE v. BOICOURT.

MALPRACTICE.—Pleading.—Waiver of Tort.—In an action against a physician for malpractice, the plaintiff may elect to sue on contract, and thus waive the tort.

SAME.—Pleading.—Actions *Ex Contractu* or *Ex Delicto*.—A complaint in an action against a physician for malpractice alleged that the plaintiff employed the physician to give professional attention to his wife, in child-birth, for which compensation was to be paid, and that the physician contracted with the plaintiff to render the required services; that, as a breach of said contract, the physician failed to give the plaintiff's wife proper attention, causing her great injury.

Held, that the complaint was in contract, and not in tort.

WITNESS.—Privileged Communication.—Where a plaintiff, in an action for malpractice, testifies to an occurrence of the sick room, the physician, or one in attendance as a consulting physician, may testify as to what occurred, as the plaintiff by testifying removes the obligation of secrecy on the physician's part.

From the Boone Circuit Court.

T. J. Terhune and *B. S. Higgins*, for appellant.

H. C. Wills and *O. P. Mahan*, for appellee.

ELLIOTT, J.—The material facts stated in the appellee's complaint are these: The appellant was engaged in the practice of medicine and surgery for fifteen years prior to the 17th day of April, 1883, and represented himself to be skilled as a physician, surgeon and accoucher. On the day named the appellant was employed by the appellee to give professional care and attention to his wife, for which compensation was to be paid. The appellee's wife was brought to bed in child-birth, and the appellant was employed to give her such professional care as she required to safely deliver the child, and also to bestow upon her such medical and surgical attention as might be needful until her restoration to health. The appellant failed to give his patient the proper support or attention during parturition, but through his efforts caused the period of labor to be shortened, resulting

138 420
135 154
128 420
156 540
128 420
160 174

Lane v. Boicourt.

in a laceration and rupture of the muscles connected with the genital organs. The appellant's duty was to at once bring the ruptured parts together and to take measures to cause them to reunite, but this duty he failed to perform, and negligently suffered five days to elapse before attempting to bring the parts together. When he did make the attempt, he did his work so negligently and unskilfully as to cause his patient great injury.

The outline we have given is sufficient to indicate the general scope of the complaint, but in order to determine the question which the appellant's counsel present, it is necessary to refer specifically to some of the allegations of the pleading. The question which counsel present is whether the complaint is in contract or in tort, and this question must, of course, be determined from the allegations of the pleading. It is proper to preface our analysis of the complaint by saying that a plaintiff may elect to sue in tort or in contract. It is probably true that some of the expressions contained in the prevailing opinion in *Boor v. Lowrey*, 103 Ind. 468, indicate a different doctrine, but the limitation placed upon that decision when the case was in this court for the second time, authorizes the conclusion that it was not adjudged on the first appeal that a plaintiff may not elect to sue in contract, and thus waive the tort. *Hess v. Lowrey*, 122 Ind. 225. The later decisions, as well as the earlier, very clearly assert that the tort may be waived, and an action brought upon the contract. *De Hart v. Haun*, 126 Ind. 378; *Goble v. Dillon*, 86 Ind. 327 (44 Am. R. 408); *Hoopingarner v. Levy*, 77 Ind. 455; *Burns v. Barenfield*, 84 Ind. 43; *Coon v. Vaughn*, 64 Ind. 89; *Staley v. Jameson*, 46 Ind. 159. The decisions elsewhere fully recognize the rule that the action may be maintained upon the contract of the surgeon. *Gladwell v. Steggall*, 5 Bing. (N. C.) 733; *Pippin v. Sheppard*, 11 Price, 400. In *Nelson v. Harrington*, 1 Law. Rep. Ann. 719, it is conceded that an action will lie on the contract, but it was held that the alle-

Lane v. Boicourt.

gations in the complaint before the court respecting the contract were mere matters of inducement.

Assuming that an action will lie upon a contract where facts are properly pleaded, we shall briefly give the result of our analysis of the appellee's complaint. It states that the appellee employed the appellant and promised him compensation, and this, according to the English rule, is a controlling element. It avers, although very loosely, that the appellant contracted with the appellee to render the required services. It also contains this statement, "and the plaintiff alleges, as a breach of said contract, that the defendant failed to give the plaintiff's wife the proper attention." In our opinion the complaint is in contract, and not in tort, for the averments referred to show that the pleader relied upon the agreement. The complaint can be much improved by amendment, but, as the question comes to us, we hold it sufficient as a complaint upon a contract, although we think a motion to make more specific would compel the plaintiff to amend it. We have decided the question stated because it may hereafter arise, not because it is essential to a decision of the case now before us. The complaint unquestionably states a cause of action whether it be construed as declaring in contract or in tort, and, if it does, the demurrer can not prevail against it. The appellant's counsel hint, rather than assert, that a question of the statute of limitations is involved, but there is no such question in the record.

We come now to a question presented by the ruling denying a new trial. The appellee, his wife, and his wife's mother, testified as to all that was done by the appellant at the time the surgical operation which caused the injury to the appellee's wife was performed. The appellant also testified, without objection, to what occurred at that time. He then called Dr. Williamson, who was in attendance as a consulting surgeon, but the trial court refused to permit him to testify to any matter that occurred at the time the operation

Lane v. Boicourt.

was performed by the appellant. In our judgment this was error.

The testimony given by the witnesses of the appellee broke the seal of privacy, and gave publicity to the whole matter. The patient waived the statutory rule. The course pursued laid the occurrence open to investigation. Nothing was privileged, since all was published. The statute was not meant to apply to such a case as this, nor is it within the letter or the spirit of the law. If a patient makes public in a court of justice the occurrences of the sick room for the purpose of obtaining a judgment for damages against his physician, he can not shut out the physician himself, nor any other who was present at the time covered by the testimony. When the patient voluntarily publishes the occurrence, he can not be heard to assert that the confidence which the statute was intended to maintain inviolate continues to exist. By his voluntary act he breaks down the barriers, and the professional duty of secrecy ceases. It would be monstrous if the patient himself might detail all that occurred, and yet compel the physician to remain silent. The principle is the same whether the physician called is a consulting physician, or is the defendant. The opening of the matter to investigation removed the obligation of secrecy as to all, not merely as to one. When the obligation to silence is broken, it is broken for the defendant as well as for the plaintiff. As to all witnesses of the transaction it is fully opened to investigation, if opened at all, by the party having a right to keep it closed. A patient can not elect what witnesses shall be heard, and what shall not; for if once investigation legitimately begins, it continues to the end. A patient may enforce secrecy if he chooses, but where he himself removes the obligation he can not avail himself of the statute to exclude witnesses to the occurrence. The case of *Hope v. Troy, etc., R. R. Co.*, 40 Hun, 438, is not in point. In that case the physicians were called at different times; here there was one time and one occurrence, and that occurrence

Plank v. Jackson.

was given full publicity by the patient. It is only the secrets of the sick room, or of the consultation, we may say in conclusion, that the physician is forbidden to reveal, and what is made public by pleadings and by evidence in a court of justice can by no possibility be privileged to benefit the party who thus gives it such wide publicity.

Judgment reversed.

Filed June 9, 1891.

128	424
138	20
128	494
149	145
128	424
165	511

No. 14,686.

PLANK v. JACKSON.

GAMING.—*Dealing in Options.*—*Loan of Money to be Used in.*—*Lender's Knowledge.*—*When Recovery will be Defeated.*—Where a person loans money, and, as a part of the arrangement, it is to be used in dealing in options or futures, and he is interested in such contracts or assists in bringing the parties together, and aids in consummating such contract, by conspiring with and urging and aiding the party to whom he loans the money to make such investment, and loans him the money to be so invested, he becomes *particeps criminis*, and the law will not aid him to collect the money which he parted with under such circumstances.

SAME.—*Instruction.*—An instruction that the mere knowledge on the part of the lender that the borrower intends to use the money to pay a debt which the borrower is under no legal obligation to pay by reason of its growing out of a gambling or unlawful contract, makes a note given for such money so loaned void, is erroneous.

SAME.—*Section 4950, R. S. 1881, Construed.*—Section 4950, R. S. 1881, was enacted to prevent the borrowing of money to be at the time wagered, and does not include cases where money is borrowed with an intention on the part of the borrower to invest it in some speculative transaction at some time in the future, or to pay losses theretofore sustained.

PRACTICE.—*Instruction.*—*Bill of Exceptions.*—Section 533, R. S. 1881, clause 6, relating to making the instructions a part of the record by order of court without a bill of exceptions, does not take from a party the right to bring the instructions into the record by bill of exceptions.

From the Elkhart Circuit Court.

J. D. Osborne and A. S. Zook, for appellant.

J. H. Baker and F. E. Baker, for appellee.

Plank v. Jackson.

OLDS, C. J.—This is an action by the appellant against the appellee on several promissory notes executed by the appellee to the appellant.

The complaint is in several paragraphs, each counting on a promissory note. The appellee answered in three paragraphs. The first, payment, the second, want of consideration, and the third that the notes were given for money borrowed to be used by the appellant and appellee, jointly and individually, in gambling contracts, investing in margins on grain, and to make good and pay losses sustained by them jointly and individually, stating fully that the notes were given for money to be used, and which was used, by them, jointly and severally, by investing in gambling and unlawful contracts, and in paying losses sustained on account of such contracts.

This third paragraph of answer was demurred to by appellant, the demurrer was overruled, exceptions were reserved, and the ruling assigned as error.

It is contended by counsel for appellant that this ruling was erroneous for the reason that the answer only shows that the money was borrowed with the knowledge of the appellant that the money was to be used, or intended to be used, in gaming contracts, by investing in options on grain, in which contracts appellant had no interest, and that a mere knowledge on the part of the appellant that such was the purpose of the appellee was not sufficient to defeat the collection of the note.

If the answer justified the construction the appellant places upon it, then it would be defective, for, as held in the case of *Jackson v. City Nat'l Bank*, 125 Ind. 347, mere knowledge on the part of the lender that the borrower intended to use it by investing in such contracts, is not sufficient to defeat a recovery on the note, though the borrower did intend, at the time of receiving the money, to use it in such unlawful purpose; he was at liberty to change his mind, and the lender has no control over the money after he parts

Plank v. Jackson.

with it and receives the note for its payment. But in this case the answer will not bear such a construction. It charges directly, and repeats the charge in various forms, that the appellant was interested in the gambling contracts.

It is further contended by counsel that options or futures on grain are not a wager, as the word is used in common acceptance, and that as the deals were to be made outside of this State, in the city of Chicago, to make a good answer it must allege and set up a statute of the State of Illinois making such deals unlawful.

We are cited by counsel to the case of *Sondheim v. Gilbert*, 117 Ind. 71, but in that case there is the following statement of the law in relation to contracts of this character:

“While contracts for the sale of property to be delivered in the future are valid, where the parties, or either one of them, actually contemplate a delivery of the subject-matter of the contract, yet if, under the guise of a contract which has the appearance of validity upon its face, the real intention is merely to speculate on the rise or fall of the market, without any purpose that any property shall be delivered or received, but with the understanding that at the appointed time the account is to be adjusted by paying or receiving the difference between the contract and the current price, then the whole transaction is illegal, as against public policy, and falls under the condemnation of the law.”

In the case of *Whitesides v. Hunt*, 97 Ind. 191, the court says: “In the case of *Rumsey v. Berry*, 65 Me. 570, the court very clearly defines the line which separates the two classes of contracts, the legal from the illegal. In that case, it was said: ‘A contract for the sale and purchase of wheat to be delivered in good faith at a future time is one thing, and is not inconsistent with the law. But such a contract entered into without an intention of having any wheat pass from one party to the other, but with an understanding that at the appointed time the purchaser is merely to receive or pay the difference between the contract and the market-

Plank v. Jackson.

price, is another thing, and such as the law will not sustain. This is what is called a settling of the differences, and as such is clearly and only a betting upon the price of wheat, against public policy, and not only void, but deserving of the severest censure.' "

These decisions of our own court are in harmony with and but state the law as held by the Supreme Court of the United States in the case of *Irwin v. Williar*, 110 U. S. 499. We think the words "dealing in options, futures or margins" are well understood to mean a mere speculative contract, in which the parties speculate in the rise or fall of prices, and imply a contract in relation to the prices of the article, and not the article itself. And when the person loans money, and, as a part of the arrangement, it is to be used in such speculative contracts, and he is interested in such contracts, or assists in bringing the parties together and aids in consummating such contract by conspiring with and urging and aiding the party to whom he loans the money to make such investments, and loans him the money to be so invested, he becomes *particeps criminis*, and the law will not aid him to collect the money which he parted with under such circumstances.

There was a trial and verdict for the appellee. A motion was made by appellant for a new trial and overruled, exceptions were saved to the ruling, and such ruling is assigned as error.

Numerous questions arising under this ruling are discussed, but owing to the view we take of the case it is necessary to consider but one, and that is the giving of the seventh instruction.

The court instructed the jury as follows:

"7th. As to the 5th note of \$2,000, the 6th note of \$500 and the 9th note of \$500, the defendant claims a different defence. He claims that he was engaged in dealing in options and futures on the board of trade of Chicago, in buying and selling grain and produce for future delivery, and that such

Plank v. Jackson.

deals were made without any intent to pay for or deliver the commodity, but to settle the differences only, and were, therefore, illegal and gambling contracts and deals, and that he borrowed the money for which such notes were given to put up or pay margins called for on such deals. If the defendant was engaged in transactions and deals on the board of trade which were unlawful and gambling contracts and deals under the rule I have given you, and if during the pendency of such deals and contracts, margins were called for and were necessary to be paid in order to prevent the deals from being closed out, and if to pay such margins the defendant borrowed such money of the plaintiff, and the plaintiff at the time knew the purpose to which the money was to be applied and furnished it for such purpose and knew the unlawful character of such deals, and if the money was used for such purpose, then the notes given therefor are void and the plaintiff can not recover thereon; but if the plaintiff did not know the purpose to which the money was to be applied, and furnished it for such purpose, or if the plaintiff did not know the unlawful character of the transactions or the deals then pending, then the notes are valid and the plaintiff is entitled to recover the amount due thereon."

This instruction stated the law to be that the mere knowledge on the part of the lender that the borrower intends to use the money to pay a debt which the borrower is under no legal obligation to pay by reason of its growing out of a gambling or unlawful contract, makes a note given for such money so loaned void. It is true it is coupled with the statement "if the money was used for such purpose," but this latter element, we think, can have no bearing upon the correctness of the former statement. If the note is void it is void at the time it is executed, and its validity does not depend upon whether the borrower used it for such purpose or not, but it illustrates the unsoundness of the doctrine that mere knowledge on the part of the lender of the purpose

Plank v. Jackson.

for which the borrower intends to use the money makes the note void, for it recognizes the fact that the lender has no control over the money after he parts with it. And if he simply makes the loan, leaving the borrower at liberty to use it as he may see fit, having no control of it, the borrower may change his mind and use it for a lawful purpose. *Wood v. Wood*, 124 Ind. 545-553.

It is held in the cases of *Sondheim v. Gilbert*, *supra*, and *Jackson v. City Nat'l Bank*, *supra*, that a mere knowledge on the part of the lender of the borrower's intention at the time to use the money for an unlawful purpose would not invalidate the note.

Though the authorities differ as to this rule, this court has adopted and adhered to the rule as stated. There can be no difference in the principle applicable to a loan, where the borrower intends to invest in a gambling contract, and where he intends to use it for the purpose of paying losses sustained. In either case the intended use is for an unlawful purpose, and under the rule as laid down by this court there must be something more than mere knowledge on the part of the lender of the borrower's intention to use it for such unlawful purpose. He must do something whereby he becomes *particeps criminis* in the unlawful transaction. But it is suggested by counsel for appellee that this comes within the provisions of the statute, section 4950, R. S. 1881, but we do not think it does. The statute, doubtless, was enacted to prevent the borrowing of money to be at the time wagered; it provides that notes given "for repaying any money lent at the time of such wager for the purpose of being wagered, shall be void," and by its language covers cases of loaning money at the time of the wager for the purpose of being wagered, and does not include cases where money is borrowed with an intention on the part of the borrower to invest it in some speculative transaction at some time in the future, or to pay losses theretofore sustained. It was intended to prevent the loan of money to persons under

Plank v. Jackson.

the heat of excitement to aid them in making an unlawful use of it at the time, by wagering it. The transactions in which appellant and appellee were engaged differ to some extent from a wager in the strict sense of the word, and yet they are of the same nature; they are speculative contracts, and against public policy, and declared void on that account.

The court erred in giving the seventh instruction. It was in regard to a vital question in the case, and it must, we think, have influenced the jury. For this error the judgment must be reversed.

The remaining errors discussed may not arise on a retrial of the case, and it is unnecessary to consider them. The law, as applicable to the case, having been settled by recent decisions, it will be to no purpose to consider the remainder of the instructions.

Judgment reversed, at costs of appellee.

Filed Jan. 30, 1891.

ON PETITION FOR A REHEARING.

OLDS, J.—Counsel for the appellee insist on a rehearing in this cause for the reason that the record nowhere shows that the instructions given and refused were ever filed and made a part of the record or signed by the judge, as required by the 6th clause of section 533, R. S. 1881.

This section relates to making the instructions a part of the record by order of court without bill of exceptions, and does not take from a party the right to bring the instructions into the record by bill of exceptions.

In this case the instructions given and refused were brought into the record by bill of exceptions. The record shows the bill was presented to the court and signed and ordered made a part of the record at the same time at which the trial of the cause was had, and before the ruling on the motion for a new trial, and they are properly in the record.

The petition for rehearing is overruled.

Filed June 10, 1891.

Hawkins et al. v. Taylor et al.

No. 15,129.

HAWKINS ET AL. v. TAYLOR ET AL.

RES ADJUDICATA.—*Quieting Title.*—*Right of Alienation.*—*Estoppel.*—Section 18, 1 G. & H., provides that if a widow remarries, holding real estate in virtue of a previous marriage, such widow may not during such marriage, with or without her husband's assent, alienate such real estate, and if during such marriage she shall die the real estate shall go to her children by the previous marriage. While this statute was in force, during a second marriage, a widow and her children conveyed real estate held by descent from the widow's former husband. In a suit instituted by the grantee, in which the widow and her children were made parties, the title was quieted.

Held, that the children were estopped by the decree to dispute, upon the widow's death, the validity of the alienation, having failed to do so in the suit to quiet title.

PARTITION.—*Pleading.*—*General Denial.*—*Relinquishment of Widow's Interest.*—*Evidence.*—In an action for partition the heirs claimed one-third of the land, and the defendant the entire tract.

Held, that the title was put in issue, and that under sections 1055 and 1070, R. S. 1881, evidence was admissible under the general denial tending to prove a parol partition of the land between the widow and children, by which the widow's interest in the land in dispute was divested, she taking instead other lands equal in value to one-third of the land owned by her former husband, since such a partition would be a complete defence to the action.

From the Daviess Circuit Court.

J. W. Ogdon, M. F. Burke and W. F. Townsend, for appellants.

W. R. Gardiner, S. H. Taylor, J. W. Burton, J. C. Billheimer and J. Downey, for appellees.

COFFEY, C. J.—This was an action instituted in the Daviess Circuit Court by Hiram L. Hawkins, Mary J. Harris, Jennie Hawkins and Ella Hawkins against William A. Taylor and others for the partition of the lands described in the complaint.

The complaint alleges that the appellants are the owners in fee of the undivided one-third of the land, and that the appellees own the remaining undivided two-thirds; that the

128	431
133	157
128	431
134	249
134	505
128	431
140	543
128	431
156	570

Hawkins et al. v. Taylor et al.

appellants and the appellees are tenants in common, and that the appellees are claiming some interest in the one-third so owned by appellants, when, in truth and in fact, they have no right, title or interest therein.

Prayer for partition, and that appellees be forever enjoined from asserting or claiming any interest in the one-third so owned by the appellants.

An additional complaint was filed in the cause, in which it was alleged, in addition to the facts above set out, that the appellees had executed certain mortgages upon their interest in the land in controversy, to which additional complaint was attached a prayer that the interest of the appellants be set off freed from the lien of said mortgages.

The appellees, except Francis M. Harned, the *Ætna Life Insurance Company* and the *Evansville and Indianapolis Railroad Company*, filed a joint answer to the complaint, the first paragraph of which is a general denial.

The second paragraph avers that at the October term of the *Daviess Circuit Court* for the year 1875, the appellee *Joseph M. Taylor* brought suit therein against *Eli E. Hawkins*, *Catharine E. Hawkins*, his wife, *Elias Grace* and *Charlotte Grace*, then his wife, *John P. Coup* and *Mary J. Coup* (now *Mary Harris*), *Hiram L. Hawkins* and *Laura Hawkins*, to quiet his title to the land in controversy in this suit; that in said suit it was adjudged and decreed by said court that the said *Joseph M. Taylor* was the owner of, and then held the title in fee simple to, the entire tract of real estate described in the complaint in this cause, and a decree was therein entered forever quieting his title to said land against the claim of said parties thereto; that the appellees, other than *Joseph M. Taylor*, make title to said land through the said *Joseph M. Taylor*; that the appellants, *Hiram L. Hawkins* and *Mary J. Harris*, formerly *Mary J. Coup*, are the same persons who were defendants in said action, and that the appellants *Jennie Hawkins* and *Ella Hawkins* are the children of *Eli E. Hawkins*, who was a defendant in said

Hawkins et al. v. Taylor et al.

suit, and who has since died, and that the said Jennie and Ella Hawkins succeeded to the rights of the said Eli E. Hawkins, and have no other claim to said land.

Upon issues formed the cause was tried by the court, who entered a finding for the appellees, and over a motion for a new trial entered judgment on the finding.

The only error assigned is that the court erred in overruling the motion of the appellants for a new trial.

The facts in the case, as disclosed by the evidence, are that William Hawkins died intestate about the year 1854, seized in fee of the land in dispute, together with other lands in Daviess county, and leaving as his only heirs at law his widow, Charlotte Hawkins, and the following named children: Benjamin J. Hawkins, Eli E. Hawkins, Mary J. Hawkins and Hiram L. Hawkins. In the year 1857 the widow married Elias Grace. Benjamin J. Hawkins died intestate in the year 1858, leaving his mother and the brothers and sister above named as his only heirs at law.

On the 18th day of January, 1870, Elias Grace and Charlotte, his wife, Eli E. Hawkins and Catherine E., his wife, and Mary J. Harris (then Coup) and John P. Coup, her husband, conveyed to Joseph M. Taylor, by general warranty deed of that date, the undivided seven-ninths of the land in controversy here, and on the same day, by order of the common pleas court of Daviess county, Elias Grace, as the guardian of Hiram L. Hawkins, conveyed to Taylor the remaining two-ninths of said land. Taylor paid the full value of the land, which amounted to \$14,350. No part of the money was paid to Charlotte Grace, the widow, but the whole consideration was paid to the children of William Hawkins, deceased.

There is evidence tending to prove that at the time of the sale of this land to Taylor it was agreed between the children of William Hawkins, deceased, and Charlotte Grace, their mother, and Taylor, the purchaser, that Mrs. Grace

Hawkins et al. v. Taylor et al.

should take her interest in the lands of which her former husband died seized in lands other than the lands in dispute here, and that pursuant to such agreement she did take possession of other lands, and occupied them until her death, which occurred in 1887. Charlotte lived with her second husband from the date of their marriage until her death at the date above stated.

The proof fully sustains the second paragraph of the answer above set out.

Two controlling questions are presented for our consideration, namely :

First. Are the appellants in this case estopped from claiming any interest in the land in controversy by the decree of the Daviess Circuit Court quieting title thereto in Joseph M. Taylor ?

Second. Was evidence admissible under the issues in the cause tending to prove a parol partition of the lands of which William Hawkins died seized between Charlotte Grace and the children of William Hawkins, deceased ?

It is contended by the appellants that, under the provisions of section 18, 1 G. & H. 411, the deed executed by Charlotte Grace and her husband to Taylor on the 18th day of January, 1870, was void, and did not vest her interest in the land, and that upon her death it vested in her children by William Hawkins and their descendants. This statute provides that if a widow shall marry a second or any subsequent time, holding real estate in virtue of any previous marriage, such widow may not, during such marriage, with or without the assent of her husband, alienate such real estate, and if during such marriage such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be.

The argument is that an action to quiet title operates on existing titles only, and that, as the appellants acquired title to the land in dispute by descent from Charlotte Grace after the action of Taylor to quiet his title, the title now held by

the appellants is not affected by the decree entered in that case.

The general rule is that a judgment or decree does not conclude rights and interests which did not exist at the time the judgment or decree was rendered. The rule is the result of the well-known principle that a judgment or decree does not conclude matters which the parties had no opportunity to litigate. Freeman Judgments (3d ed.), section 329.

In this case, however, the parties did have the opportunity to litigate the validity of the deed executed by Mrs. Grace to Taylor. Had the action been against Mrs. Taylor alone, the appellants here would not have been bound by the decree, for their right to inherit the land through their mother could not have been affected by a proceeding to which they were not parties. But in Taylor's action to quiet title the appellants here were made parties defendant. Had Taylor's rights depended wholly upon his deed from Mrs. Grace, the court, no doubt, would have so framed the decree as to save the expectant interest of the appellants; but there is nothing in the record which enables us to say that Taylor based his claim to the land upon the deed from Mrs. Grace. In that case the decree may have been based upon the fact that the appellants were estopped from claiming the land because they received and still held all the purchase-price of the land, or it may have been based upon the fact that there had been a valid partition of the land of which William Hawkins died seized, whereby Mrs. Grace had been divested of any interest in the land in controversy. Indeed, it is useless to conjecture as to the foundation of the decree quieting title in Taylor, for such decree undoubtedly estopped Mrs. Grace from claiming any interest in the land, and, as the appellants must make their title through her, they are likewise estopped.

This, as we have said, would not, perhaps, be so in a case like this, where the children by a former marriage were not parties to the suit; but where they are made parties, as in

this case, and take no steps to protect their expectant interest, we think they should be bound by the decree which estops the party through whom they must make their title.

It is further contended by the appellants that, under the issues in the cause, evidence was not admissible tending to prove a parol partition between the appellants and Mrs. Grace.

There is no plea setting up such partition, but the appellees claim that they had the right to introduce such evidence under the general denial. They base their claim on the provisions of sections 1055 and 1070, R. S. 1881. These sections are found in the code under the title "Ejectment."

Section 1055 provides that the answer of the defendant may contain a denial of each material statement or obligation in the complaint; under which denial the defendant shall be permitted to give in evidence every defence to the action that he may have, either legal or equitable.

Section 1070 is found in connection with provisions for quieting title, and provides that the rules above prescribed shall, in such cases, be observed as far as they are applicable; and in partition cases, when the title to real estate is *bona fide* in question, upon the pleadings and evidence between the parties.

Under this last named section it has often been held that a defendant in an action to quiet title may give in evidence all his defences to such action under the general denial. By the express terms of the section the same rule is to be applied in actions for partition where the title to the land is *bona fide* involved in the pleadings and evidence.

Ordinarily, the title is not in issue in a partition suit, but the pleadings may be so drawn as to put the title in issue. *Isbell v. Stewart*, 125 Ind. 112; *Davis v. Lennen*, 125 Ind. 185.

It will be observed that the complaint in this cause is drawn with a view of quieting title to the land in dispute, as well as obtaining partition of the same.

It is perfectly manifest, both from the pleadings and evidence in the cause, that, while the appellants claim to be the

Hawkins et al. v. Taylor et al.

owners in fee of one-third of the land described in the complaint, the appellees claim to be the owners of the entire tract. We think the case is one where the title to the land is in question both by the pleading and evidence in the cause, and, being such, the court did not err in permitting the appellees to introduce evidence tending to prove a parol partition of the lands of which William Hawkins died the owner. If true that Mrs. Grace and the appellants made a parol partition of such lands, whereby the interest of Mrs. Grace in the land here in dispute was divested, such partition was a complete defence to this action.

The evidence tends strongly, we think, to prove such partition, and that Mrs. Grace took actual possession of the land assigned to her, and held and enjoyed it for a period of about seventeen years, and until her death.

The fact that the appellants received, and still retain, the full purchase-price for the land they now claim, coupled with the fact that Mrs. Grace was assigned land equal in value to about one-third of the land owned by William Hawkins when he died, together with the other facts and circumstances surrounding the parties, authorized the court to find, we think, that Mrs. Grace, at the time of her death, had no interest in the land involved in this suit.

There are some other questions, of minor importance, presented and argued by the appellants in their able brief, but they are not of controlling influence in the case. They relate, principally, to the admission and rejection of evidence, and need not be set out in this opinion.

We have given them each a careful consideration, and do not think the court erred in the matters of which complaint is made.

After a careful consideration of all the questions presented we are of the opinion that there is no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed June 10, 1891.

City of Frankfort v. The State, *ex rel.* Ross.

128 438
131 116

No. 14,921.

CITY OF FRANKFORT v. STATE, EX REL. ROSS.

STREET IMPROVEMENT.—Unplatted Lands.—Assessment for Improvement.—

Public Highway.—Under the act of April 13th, 1885 (Acts 1885, p. 207), relating to the improvement of streets and alleys, the power to assess to a distance of one hundred and fifty feet back from the line of the improvement can only be exercised where there is a tract of unplatted land extending back that distance. The lands included in a public highway, on which the unplatted tract abuts, can not be assessed for the improvement, neither can the highway be crossed, and tracts of land lying beyond it be assessed for such improvement.

From the Clinton Circuit Court.

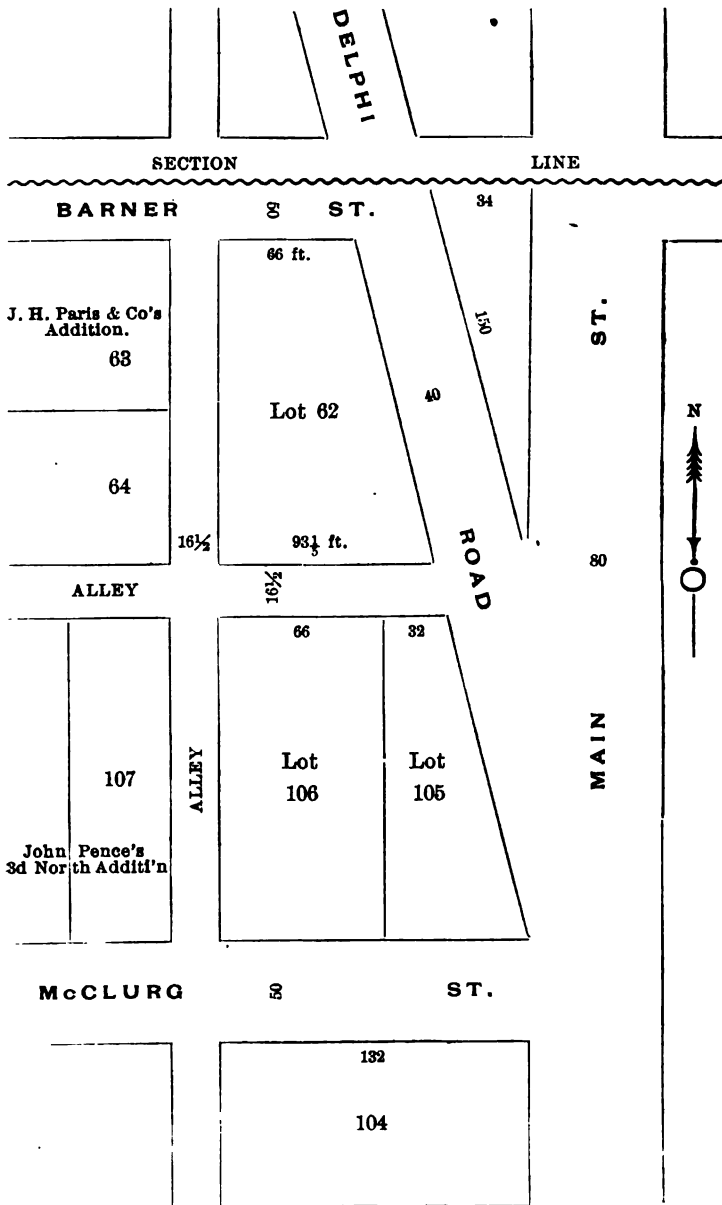
J. C. Farber, for appellant.

O. E. Brumbaugh, for appellee.

McBRIDE, J.—On the 2d day of April, 1885, the common council of the city of Frankfort enacted an ordinance for the improvement of a part of Main street in that city. Thereafter such steps were taken that on the 7th day of May, 1885, the contract for making the improvement was awarded to the relator. By the terms of the contract the relator was to collect the cost of the improvement from the owners of lands abutting thereon, except at the crossings of streets and alleys, upon estimates and assessments to be made by the appellant. After the completion of the work an estimate was made covering the entire cost of the work, which was apportioned and assessed against the several tracts of land bordering upon the improvement, in the ratio of the front lines of the same.

This has all been collected, except the sum of \$264.60, which was assessed against a triangular tract of land which has a frontage of 147 feet on the improvement, and is 34 feet wide at one end and comes to a point at the other end. This tract is formed by the intersection of Main street and a public highway known as the Delphi road, as shown in the following plat :

City of Frankfort v. The State, *ex rel.* Ross.



City of Frankfort v. The State, *ex rel.* Ross.

This tract, the relator alleges, is worthless, and the assessment made thereon not collectible. His contention is that the assessment as to this particular tract is not in compliance with the law; that instead of assessing only the triangular tract in the angle formed by the two streets, the assessment should have covered a strip extending one hundred and fifty feet back from the line of the improvement. The court below awarded him a peremptory writ of mandate commanding the common council to make an assessment in accordance with his demand, and this appeal is prosecuted from the judgment thus rendered.

The power possessed by common councils of incorporated cities to make estimates and assessments for the collection of the cost and expense of street improvements is purely statutory. Statutes conferring such powers are strictly construed. Elliott Roads and Streets, 371, *et seq.*, and authorities there cited.

The only statute in force when the assessment in question was made which bears directly upon the proposition involved was section 753, Elliott's Supp., as follows:

"In all contracts heretofore made or which may be hereafter made by order and under the direction of the common council of any city in this State for the grading, paving, guttering and improvement of any street or alley in such city, the cost of such improvements shall be estimated according to the whole length of the street or alley, or the part thereof to be improved per running foot; and the city shall be liable to the contractor for so much thereof only as is occupied by public grounds of the city bordering thereon, and the crossings of streets and alleys; and the owners of lots bordering on such street or alley or the part thereof to be improved, shall be liable to the contractor for their proportion of the cost, in the ratio of the front lines of lots owned by them to the whole improved line; and in all cases where such improvement shall have been made, or may hereafter be made, on any street or alley running along or through any un-

City of Frankfort v. The State, *ex rel.* Ross.

platted lands lying within the corporate limits of such city, the cost of such improvements shall be estimated according to the whole length of the street or alley or the part thereof to be improved per running foot, and the owners of such unplatted lands bordering on such street or alley, or the part thereof to be improved, shall be liable to the contractor for their proportion of the cost, in the ratio of the front lines of such unplatted lands owned by them to the whole improved line; and in making the assessment against such owners for the improvement, such unplatted lands shall be assessed across the ground fronting or immediately abutting on such improvement back to the distance of one hundred and fifty feet from such front line, and the contractor shall have a lien thereon for the value of such improvements: *Provided, however,* That where such land is subdivided, the land lying immediately upon and adjacent to the line of the improvement shall be primarily liable to and for the whole cost of the improvement, and should that prove insufficient to pay such cost, then the second parcel and other parcels in their order to the rear parcel of said one hundred and fifty feet shall be liable in their order." * * *

The return to the alternative writ showed that the triangular tract was unplatted land, and upon this fact appellee bases his contention that the assessment should have extended back a distance of one hundred and fifty feet regardless of the existence of the highway. They say:

"The assessment must in all cases be made strictly in pursuance of the statute, which requires it to be made by assessing back a distance of one hundred and fifty feet; and it is not the duty of the appellant to forestall the property-owner's defence, if he should choose to make it, by refusing to make the assessment extend back a distance of one hundred and fifty feet on account of having to cross a public highway in so doing.

"The location of a public highway upon lands, as alleged in the appellant's answer, in no way affects the title of the

City of Frankfort v. The State, *ex rel.* Ross.

This tract, the relator alleges, is worthless, and the assessment made thereon not collectible. His contention is that the assessment as to this particular tract is not in compliance with the law; that instead of assessing only the triangular tract in the angle formed by the two streets, the assessment should have covered a strip extending one hundred and fifty feet back from the line of the improvement. The court below awarded him a peremptory writ of mandate commanding the common council to make an assessment in accordance with his demand, and this appeal is prosecuted from the judgment thus rendered.

The power possessed by common councils of incorporated cities to make estimates and assessments for the collection of the cost and expense of street improvements is purely statutory. Statutes conferring such powers are strictly construed. Elliott Roads and Streets, 371, *et seq.*, and authorities there cited.

The only statute in force when the assessment in question was made which bears directly upon the proposition involved was section 753, Elliott's Supp., as follows:

"In all contracts heretofore made or which may be hereafter made by order and under the direction of the common council of any city in this State for the grading, paving, guttering and improvement of any street or alley in such city, the cost of such improvements shall be estimated according to the whole length of the street or alley, or the part thereof to be improved per running foot; and the city shall be liable to the contractor for so much thereof only as is occupied by public grounds of the city bordering thereon, and the crossings of streets and alleys; and the owners of lots bordering on such street or alley or the part thereof to be improved, shall be liable to the contractor for their proportion of the cost, in the ratio of the front lines of lots owned by them to the whole improved line; and in all cases where such improvement shall have been made, or may hereafter be made, on any street or alley running along or through any un-

City of Frankfort v. The State, *ex rel.* Ross.

platted lands lying within the corporate limits of such city, the cost of such improvements shall be estimated according to the whole length of the street or alley or the part thereof to be improved per running foot, and the owners of such unplatted lands bordering on such street or alley, or the part thereof to be improved, shall be liable to the contractor for their proportion of the cost, in the ratio of the front lines of such unplatted lands owned by them to the whole improved line; and in making the assessment against such owners for the improvement, such unplatted lands shall be assessed across the ground fronting or immediately abutting on such improvement back to the distance of one hundred and fifty feet from such front line, and the contractor shall have a lien thereon for the value of such improvements: *Provided, however,* That where such land is subdivided, the land lying immediately upon and adjacent to the line of the improvement shall be primarily liable to and for the whole cost of the improvement, and should that prove insufficient to pay such cost, then the second parcel and other parcels in their order to the rear parcel of said one hundred and fifty feet shall be liable in their order." * * *

The return to the alternative writ showed that the triangular tract was unplatted land, and upon this fact appellee bases his contention that the assessment should have extended back a distance of one hundred and fifty feet regardless of the existence of the highway. They say:

"The assessment must in all cases be made strictly in pursuance of the statute, which requires it to be made by assessing back a distance of one hundred and fifty feet; and it is not the duty of the appellant to forestall the property-owner's defence, if he should choose to make it, by refusing to make the assessment extend back a distance of one hundred and fifty feet on account of having to cross a public highway in so doing.

"The location of a public highway upon lands, as alleged in the appellant's answer, in no way affects the title of the

City of Frankfort v. The State, *ex rel.* Ross.

lands; it is well settled by the law in this State, that a public highway is but an easement, and that the title to the lands over which it passes is in the owners of the lands upon either side of the highway, to the center of the highway."

The circuit court in awarding the peremptory writ evidently adopted this view, and in this it erred. It is true that a public highway is, in this State, but an easement, the fee remaining in the owner of the adjacent land. During the existence of the easement, however, the servient estate is not subject to assessment for local improvement. The statute does not attempt to confer on common councils power to make any assessment thereon, nor does it give authority to cross the line of such easement to assess lands lying beyond. As common councils can, in such cases, exercise only such powers as the Legislature has expressly conferred upon them, if this power of the Legislature to grant such authority is conceded, it has not, in this case, attempted to do so. The statute only authorizes the assessment of benefits on tracts of land bordering on the improvement made. When a public highway has been established across a tract of land, dividing it into two parts, it is thereafter, during the existence of the highway, not one, but two tracts, notwithstanding the ownership of the fee remains unchanged. The power to assess to a distance of one hundred and fifty feet back from the line of the improvement can only be exercised when there is a tract of unplatted land extending back that distance.

The fact that it may be subdivided does not deprive the council of the power to assess for that distance, and the statute expressly provides for such a case. But if the unplatted tract extends back less than one hundred and fifty feet, and then abuts in turn upon another street, the statute gives no authority to extend the limits of the assessment beyond such unplatted tract. It is unnecessary for us to consider how far the Legislature might go in conferring upon cities the power to assess, for local improvements, lands which do not

City of Frankfort v. The State, *ex rel.* Ross.

abut upon the improvement for which the assessment is made. It is enough for us to know, in this case, that so far as unplatted lands are concerned, only such tracts as abut on, or, in the language of the statute, "border on," the improvement can be assessed, except only that if such tract is subdivided the subdivisions within the limits of one hundred and fifty feet are all liable to assessments.

Counsel for appellee err in arguing that, as statutes of this character are strictly construed, such construction should be given it as will compel the common council to assess to a distance of one hundred and fifty feet, regardless of the existence of the Delphi road, and that it should be left to the property owners affected to contest the validity of their action when the contractor seeks to enforce the assessment. This would be a clear perversion of the rule which requires the strict construction of such statute, with the view of preventing the attempted exercise by common councils of powers not clearly within the legislative intent in their enactment.

Common councils are, in such cases, bound to take notice of the dimensions and boundaries of the several tracts against which they make assessments. In this case the common council was bound to take notice of the existence of the Delphi road, and that while an unplatted tract of land one hundred and forty-seven feet long bordered on the improvement, its power to assess ended when it reached that road; and that it could not legally assess either the lands included in the Delphi road, or cross that road and assess other tracts of land lying beyond.

Several questions arising on the pleadings are argued, but as the entire actual controversy is over the question above considered, and there is no dispute about the facts, we have thought it unnecessary to pass upon any other question.

While the hardship upon appellee growing out of the application of the law occasions regret, yet this is something for which the courts are not responsible.

Mills et al. v. Franklin et al.

Nor is it just to censure the appellant because the appellee is unable to recover compensation for the work done by him.

The laws must be administered as they are, and the remedy for any hardships thus occasioned must be sought in legislation. The appellee, in contracting to make the improvement in question, was bound to know the limit of the power possessed by the common council. That he was mistaken, and is liable to suffer loss because he overestimated these powers, would not justify either the common council or the courts in misinterpreting or in misapplying the law.

Judgment reversed, with costs.

Filed June 10, 1891.

No. 15,088.

MILLS ET AL. v. FRANKLIN ET AL.

WILL.—Construction of.—Fee Simple Title.—What Language Passes.—Under a will which provided as follows: "I give and bequeath to my beloved wife, Margaret Wyatt, during her lifetime, 99 acres of land (describing it), together with all my personal estate, and at her death I will and bequeath the said 99 acres of land, together with the said personal estate, to my brother-in-law, Henry Ritter," the latter took a fee simple title to the real estate, subject only to the life-estate of the widow. He also took a fee simple title in certain other real estate, the will providing as to said real estate that the testator gave and bequeathed it to said Ritter.

SAME.—Intention of Testator.—Effect to be Given to.—Partial Intestacy.—Not Favored.—Disposition of Entire Estate.—Presumption as to.—Where a testator says in express terms that he gives, bequeaths or devises property, real or personal, without limiting the interest or title, or making any other disposition of, or reference to it, his intention evidently was to give the person named as donee or devisee the same right and title to the property as he himself held, and that intention must be respected and upheld. A will will not be so construed as to create a partial intestacy unless the language used compels such a construction. The

128	444
145	136
146	480
128	444
152	493
128	444
161	538
128	444
171	385

Mills *et al.* v. Franklin *et al.*

presumption is that when one forms an intention to make a will he intends to dispose of all his estate.

From the Owen Circuit Court.

I. H. Fowler, W. A. Pickens, E. C. Steele and J. H. Jordan,
for appellants.

D. E. Beem and W. Hickam, for appellees.

OLDS, J.—The appellants, heirs of Christopher Wyatt, deceased, brought this action against the appellees to recover certain real estate described in the complaint. The appellees claim title through one Henry Ritter, and the question presented is whether said Henry Ritter took a fee simple or a life-estate in the land by the will of Christopher Wyatt. The appellants insist that said Ritter only took a life-estate. So much of the will of Christopher Wyatt as has any bearing upon the question reads as follows:

Item third, "I give and bequeath to my beloved wife, Margaret Wyatt, during her lifetime, 99 acres of land off of the east side of the northeast quarter of section 12, township 9 north, of range 4 west, together with all my personal estate, and at her death I will and bequeath the said 99 acres of land, together with the said personal estate, to my brother-in-law, Henry Ritter."

Item four, "I give and bequeath to my brother-in-law, Henry Ritter, all the southwest quarter of section 12, in township 9 north, of range 4 west, together with 40 acres of land off of the west side of the northeast quarter of section 12, township 9 north, of range 4 west, and 14 acres of land in the northwest quarter of said section 12, township 9 north, of range 4 west."

It is contended by counsel for the appellants that under the common law rule "where a devise of real estate is made merely describing the property without defining the interest which the devisee shall take, it will only give a life-estate to the devisee; and that this rule of construction is in force in this State, and by the application of it to this will Ritter

Mills *et al.* v. Franklin *et al.*

took but a life-estate and the fee passed to the heirs of Christopher Wyatt."

Admitting that this rule of construction is in force, as stated in *Roy v. Rowe*, 90 Ind. 54, yet it is a somewhat technical rule of construction, and is not applied where the other expressions and language of the will indicate an intention of the testator to pass a fee simple, and due consideration must be given to other well-settled rules of construction.

It is a well-settled rule that courts will avoid giving such a construction to a will as results in a partial intestacy unless the language compels such construction. See *Cate v. Granor*, 30 Ind. 292; *Roy v. Rowe*, *supra*.

Courts in construing wills seek to ascertain and declare the true intention of testators, for the primary object in construing wills is to ascertain and give effect to the intention of the testators. *Waters v. Bishop*, 122 Ind. 516; *Daugherty v. Rogers*, 119 Ind. 254.

The question presented by this case is, Did the testator Wyatt intend to give Henry Ritter a life-estate or a fee in the real estate described in items three and four of his will?

To hold that Ritter only took a life-estate would be to so construe the will as to result in a partial intestacy, and allow the fee to pass by descent to the heirs of Wyatt; this would be in direct conflict with one of the well-settled rules applicable to the construction of wills.

In Schouler on Wills, section 483, it is said: "In this country, a devise after a life-estate, especially if made to one heir, with an evident intention of excluding the other heirs, has in several instances been held to pass a fee. And one devise made simply has been supported as a devise in fee by coupling it with another in the will which was used with suitable words of limitation. Indeed, in many States it has been held that whenever an intention to dispose of the fee can by any fair inference be drawn from the will, the technical rule

must be excluded ; and that very slight circumstances will be laid hold of as indicating such intention."

Item third of the will first carves out a life-estate in 99 acres of the land, and out of the personal estate, and gives it to the widow, and then bequeaths the 99 acres of land and personal estate as it is described, to Henry Ritter. Some stress is sought to be placed upon the words used in making the devise, that the word "estate" is used in the disposition of the personal property, while it is not used in connection with the real estate.

We are not of the opinion that the words used were selected with any nicety of purpose, with a view of expressing an intention to grant a fee to the personalty, and only a life-estate in the realty, by the mere use of words which would clearly convey such an idea without declaring it in any other manner except the use of words, the technical definition of which would express such a distinction. We have no doubt the testator believed the words used clearly conveyed his intention to give either a life-estate or a fee simple to the real estate, so that a lawyer or layman who read it would clearly understand his intention without applying any strict definition of words, or calling for a legal interpretation to construe the will and declare his intention.

In making the devise of the 99 acres to Ritter, the words "will and bequeath the said 99 acres of land" are used. The word "will" used in such connection means to dispose of by will, and the word "bequeath" means to give by will. Technically the word "bequeath" relates to personal property more properly than real estate. In this instance "devise" would have been the more appropriate word to use in the disposition of the real estate, but the word "devise" is not used in either item of the will. It is quite evident that there was no studied and careful selection of words. The commonly understood meaning of the words "will and bequeath," would convey the understanding that the testator intended to give to the devisee or legatee the particular prop-

Mills et al. v. Franklin et al.

erty described, whether it be real estate or personal property, and not that it was intended to give only a part or an interest in it, or a life-estate, but that it was a disposition of the property ; that the testator had by the use of the words disposed of it, and had given to the person named all there was of it, and passed all the title he had to it, unless words of limitation were used indicating an intention to give only a part.

✦ If one says he has given a horse to his son, we understand he has given his son a complete title ; that the father has disposed of his horse, and the son has the title to it ; and the same is true if the father says he has given his son a farm. We understand that the title has passed to the son ; in other words, that the son owns the farm that the father formerly owned. Gift, in such instances, means a gratuitous transfer by the donor to the donee.

The testator, in this instance, evidently used the words, "will and bequeath," and "give and bequeath," as expressing an intention to transfer to Ritter, at the death of the testator, the title in the real estate, that Ritter might own it the same as he, the testator, in his life, had owned it, except the life-estate in the 99 acres devised to the widow. This is manifest, not only by the words used, but by the fact that when he desired to carve out a life-estate, as in the devise and bequest of the real estate and personal property left to the wife, he explicitly declares that she takes the same during her lifetime. The purpose and object of making a will is to dispose of one's estate. The presumption is that when one forms an intention to make a will, he intends to dispose of all his estate ; hence the rule that in construing a will it will not be so construed as to create a partial intestacy, unless the language used compels such a construction. With like force and reason, and within a proper application of this rule, when the testator has expressed a clear intention to give an article of personal property, or a tract of real estate, to a designated person, and there are no limitations

Citizens' Street Railway Company *et al.* v. Robbins, Administrator.

as to title, or expressed intention to give another any interest in, or title to, the same article of personal property, or real estate, the will should be so construed as to pass to the donee, or devisee, the same interest, or title, held by the testator. It is but fair to presume that when a testator says in express terms that he gives, bequeaths, or devises property, real or personal, without limiting the interest or title, or making any other disposition of, or reference to it, his intention was to give to the person named as donee, or devisee, the same right and title to the property as he himself held; in other words, that he intends to dispose of all the interest and title he has in it.

In our opinion Henry Ritter took a fee simple title to the real estate, and the circuit court committed no error.

Judgment affirmed, with costs.

Filed June 12, 1891.

No. 13,872.

CITIZENS' STREET RAILWAY COMPANY ET AL. v. ROBBINS,
ADMINISTRATOR.

138	449
142	488
143	704
138	449
144	672
128	449
154	400

DECEDENTS' ESTATES.—*Corporate Stock.*—*Personal Property.*—Shares of stock in a corporation, owned by the decedent at the time of his death, are personal property.

SAME.—*Sale*—Such stock descends to the heirs at law, subject to the right of the administrator to subject the same to sale in the manner prescribed by the laws of the State.

SAME.—*Public and Private Sales.*—The common law right of the administrator to sell and dispose of personal property does not exist in this State. Sales of such property must be made in the manner prescribed by our statutes upon the subject. In the absence of an order from the proper court, the sale must be public, and where the sale is private, under the order of the court, it must be made in substantial compliance with the order.

SAME.—*Sales Under Order of Court.*—*When Title Passes.*—In cases of private sales, where the order of the court does not require a confirmation, if

VOL. 128.—29

Citizens' Street Railway Company *et al.* v. Robbins, Administrator.

the sale is made in substantial compliance with the order of the court, the title passes to the purchaser upon his compliance with the terms of the sale.

SAME.—Validity.—Where an order to sell stock at private sale required the administratrix to make the sale on good security, and the sale was made upon the individual note of the purchaser without any security and on a credit of ten years, the statute authorizing a credit of only twelve months, the sale was void and vested no title.

SAME.—Corporate Stock.—Transfer of on Books of Corporation.—Liability for Illegal Transfer.—In such case, if the corporation, with notice that the stock belonged to the estate of the decedent, and with notice of the order of sale, cancels the certificates of stock, and issues a new certificate to the purchaser, without inquiring into the validity of the sale, it is liable to the estate for any loss occasioned thereby. It is bound to know that the sale has been made in compliance with the terms of the order.

SAME.—Liability of Corporation to Estate.—A purchaser of such new certificate, in good faith, and without notice of any illegality in the surrender and cancellation of the original stock, is not liable to the estate, its remedy being against the corporation.

PLEADING.—Exhibits.—Admissibility in Evidence.—Where a certain sworn statement is set out in the complaint, the plaintiff can not object to its introduction in evidence by the defendant.

From the Marion Superior Court.

F. Winter, J. B. Elam, H. C. Allen and U. J. Hammond,
for appellants.

R. Hill, R. N. Lamb, S. M. Shepard, H. Gale, J. E. McDonald, J. M. Butler, A. H. Snow and A. L. Mason, for appellee.

COFFEY, J.—The amended complaint in this cause consists of two paragraphs. The first alleges, substantially, among other things, that Henry H. Catherwood, deceased, at the time of his death was the owner of three hundred and eight shares, of the par value of one hundred dollars each, of the capital stock of the Citizens' Street Railway Company; that he died intestate on the 31st day of August, 1872, leaving as his only surviving heirs at law Lucy D. Catherwood, his widow, since married to one Phelps, and two infant children, namely: Ellen B. and John C. Catherwood;

Citizens' Street Railway Company *et al.* v. Robbins, Administrator.

that said Lucy D. Catherwood was duly appointed and qualified as the administratrix of the estate of the said Henry H. Catherwood, deceased, and on the 12th day of July, 1873, upon petition to the circuit court of Marion county, procured the following order from said court, namely :

" Comes now Lucy D. Catherwood, administratrix of Henry H. Catherwood's estate, and files her petition praying that she be allowed to dispose of 308 shares of the stock of the Citizens' Street Railway Company of Indianapolis, of the par value of \$100 per share; and which has been appraised at the value of 15 cents on the dollar, and to sell the same at private sale for the appraised value thereof; and now the court having heard said petition, and being fully advised in the premises, and satisfied that the interests of said estate will be best served by selling the same at private sale, the said administratrix is, therefore, ordered and empowered to sell the said stock at private sale for the appraised value thereof, taking good and sufficient security for the payment of the purchase-money; and said administratrix is further ordered to make a return of her proceedings within 90 days from this date."

That the administratrix made no sale of said stock whatever pursuant to the terms of said order, and made no sale of said stock in compliance with the terms of the statutes of the State of Indiana regulating the sale of personal property of a decedent's estate at private sale, nor did she make any sale of said stock at public sale; that she, without any authority so to do, assigned and delivered to one John Carlisle said certificates of stock without receiving any pay therefor and without taking any security of any sort for the purchase-money therefor, taking merely as evidence of said attempted sale, and of the supposed indebtedness therefor, the promissory note of Carlisle for \$6,160 due ten years from date, no part of which note has ever been paid; that no return of said attempted sale to Carlisle, nor of any sale of said stock, nor of the proceedings of the administratrix in

Citizens' Street Railway Company *et al.* v. Robbins, Administrator.

reference thereto, was ever made to the court, and no entry in relation thereto was ever made; that after the attempted sale to Carlisle, the administratrix made out, under oath, a return of said sale to the effect that she had sold said stock to John Carlisle for the sum of \$6,160 for cash, but the same was never filed or approved by the court; that long after the attempted transfer of said stock to Carlisle, the street railway company, upon his request, wrongfully issued certificates for said stock to him, and that he, about the year 1875, sold and assigned the same to appellant, Tom L. Johnson, who bought the same with knowledge that they were issued in lieu of the certificates formerly held by Henry H. Catherwood, deceased, and that said stock had belonged to his estate, and with knowledge of the order for the sale of the same above set out, and with knowledge that no return of said sale had been made and confirmed by the court; that at the time he so purchased said stock he was a stockholder and director in said street railway company; that said street railway company has declared dividends in a large sum, which have been paid to the said Carlisle and the said Tom L. Johnson, and that before the commencement of this suit the appellee demanded said stock of the appellants, and each of them, which they each refused to surrender.

The second paragraph of the amended complaint does not differ materially from the first, except in that it alleges that on the 16th day of July, 1873, the Citizens' Street Railway Company, upon the request of Carlisle, having knowledge of the fact that said stock belonged to the estate of Henry H. Catherwood, and having knowledge of the pending administration of said estate, and of the order of sale of said stock, and the terms thereof, and having knowledge of the fact that no return of any sale under said order had as yet been made to the court, wrongfully issued certificates of stock to Carlisle, who sold and assigned the same to Johnson.

To this complaint the appellant the Citizens' Street Railway Company filed an answer consisting of three paragraphs.

Citizens' Street Railway Company *et al.* v. Robbins, Administrator.

The third paragraph avers, substantially, that, on the 16th day of July, 1873, Lucy D. Catherwood, as the administratrix of the estate of Henry H. Catherwood, obtained the order set out in the complaint, authorizing her to sell the 308 shares of the capital stock of the Citizens' Street Railway Company named in the complaint; that said stock was represented by certificates numbered 96, 97, 98, 99, 100 and 101 for fifty shares each issued to H. H. Catherwood, November 18th, 1867, certificates numbered 33, 35 and 36 for one share each, issued to E. B. Martindale, February 13th, 1865, and endorsed in blank by Martindale, and certificate numbered 37, for five shares, issued to R. B. Catherwood, February 13th, 1865, which was endorsed in blank by said Catherwood; that said Lucy D. Catherwood, as authorized and empowered as such administratrix to sell said stock at private sale, made the following endorsement upon each of said certificates numbered 96, 97, 98, 99, 100 and 101:

"I hereby transfer all my interest in the within stock to John Carlisle. July 16th, 1873.

"LUCY D. CATHERWOOD."

"For value received I assign and transfer to John Carlisle three hundred shares of the capital stock of the Citizens' Street Railway Company, this July 16th, 1873.

"LUCY CATHERWOOD,

"Adm'x of H. H. Catherwood."

And upon certificates numbered 33, 35 and 36 she made the following endorsement:

"I hereby transfer all my interest in the within stock to John Carlisle, July 16th, 1873.

"LUCY D. CATHERWOOD."

"For value received I assign and transfer to John Carlisle three shares of the capital stock of the Citizens' Street Railway Company, this 16th day of July, 1873.

"E. B. MARTINDALE,

"By Lucy D. Catherwood, Att'y in fact."

And a similar endorsement on certificate numbered 37, and

Citizens' Street Railway Company *et al.* v. Robbins, Administrator.

delivered the said certificates to John Carlisle, to be brought by him to the office of said company, and to have the same transferred to him as the owner thereof on the books of said company; that said Carlisle brought said stock to the office of the company, and requested that the same be transferred to him by cancelling the said certificates, and issuing new certificates to him in lieu thereof; that the company caused the records of the Marion Circuit Court to be examined, and ascertained that said administratrix had full power to dispose of said stock at private sale as set forth in the complaint, and, relying upon the order of the court and the endorsements made by said administratrix, and on the fact that said certificates, so endorsed, were in the possession of said Carlisle, and believing him to be the owner and purchaser of said stock, made such transfer of said stock to him, and cancelled said certificates, and issued to him in lieu thereof a new certificate numbered 135 for three hundred and eight shares of stock.

The appellant Johnson filed an answer consisting of four paragraphs.

The third paragraph avers, substantially, that the stock in controversy was represented by certificate numbered one hundred and thirty-five, issued by the Citizens' Street Railway Company to John Carlisle, on the 17th day of July, 1873, and in whose name the stock was then standing on the books of said company; that said stock was endorsed by said Carlisle, and had been pledged to the First National Bank of Indianapolis by him, or by some one in his behalf, and was so held by said bank at the time appellant purchased the same; that at the time of said purchase he had no knowledge where said stock came from, or who its previous owner had been; that at the time of the transaction between Carlisle and the Citizens' Street Railway Company and Lucy D. Catherwood he was a citizen of the State of Kentucky, and had no connection with or interest in said company, and had no knowledge or information of its affairs, and pur-

Citizens' Street Railway Company *et al.* v. Robbins, Administrator.

chased and paid for said stock without any notice or knowledge whatever of the claim of any other person thereto, believing it to be, as it purported to be, a genuine certificate of the ownership of three hundred and eight shares of the capital stock of said company; that he denies that he had any knowledge that said certificate had been issued in lieu of certificates formerly owned or held by Henry H. Catherwood, or that it had been owned by his estate, or that any order had been made for the sale of any stock belonging to said estate.

The fourth paragraph avers, substantially, the same facts averred in the third answer of the Citizens' Street Railway Company, above set out, and in addition thereto that the administratrix permitted the stock to be and remain in the name of John Carlisle, and authorized him to treat said stock as his own property, and held him out to the public as the owner thereof; that said Carlisle, or some one in his behalf, pledged said stock to the First National Bank of Indianapolis, as the owner thereof, to secure his individual indebtedness to said bank; that the said administratrix made no objection thereto, but, on the contrary, made return to the Marion Circuit Court, on oath, that she had sold said stock to Carlisle for cash, and filed the same in the records of said court where the settlement of said estate was pending; that he afterwards purchased said stock of said bank, and at the time he purchased the same he was induced to believe, and did believe, from the conduct of said administratrix, that said bank held said certificate from Carlisle as the owner thereof, and that he had no knowledge or information as to any claim thereto by the estate of Henry H. Catherwood; that at the time he purchased the same he had no knowledge or information that the same had been issued in lieu of stock formerly held by Henry H. Catherwood or his estate, and no knowledge or information of the legal proceedings set up in the complaint.

To each of these answers the court overruled a demurrer.

Citizens' Street Railway Company *et al.* v. Robbins, Administrator.

Upon issues formed the cause was tried by the court, at special term, resulting in a finding and judgment in favor of the appellants. Upon appeal to the general term the judgment was reversed, from which latter ruling this appeal is prosecuted.

The first question demanding our consideration relates to the rulings of the court at special term in overruling the demurrer to these several answers; and first in order is the third paragraph of the separate answer of the Citizens' Street Railway Company.

The capital stock in the Citizens' Street Railway Company, owned by Henry H. Catherwood at the time of his death, was personal property. Angell and Ames Corporations (11th ed.) pp. 590-596 (sections 557-560); section 4152, R. S. 1881; 1 R. S. 1876 p. 757, section 10.

Upon the death of Henry H. Catherwood the stock descended to his heirs at law, subject to the right of his administrator to subject the same to sale in the manner prescribed by the laws of the State. The common law right of the administrator to sell and dispose of personal property does not exist in this State. Sales of such property must be made in the manner prescribed by our statutes upon the subject. In the absence of an order from the proper court, the sale must be public, and where a sale is made at private sale under the order of the court, it must be made in substantial compliance with the order. *Weyer v. Second National Bank*, 57 Ind. 198; *Williams v. Perrin*, 73 Ind. 57; 2 R. S. 1876, section 48, p. 509; 2 R. S. 1876, section 60, p. 512; sections 2275-2289, R. S. 1881.

It is contended by the appellee that in cases of private sales made under the order of the court, no title passes until such sale is reported and approved by the court.

In this position we think he is in error. The statute authorizing the private sale of personal property of the decedent by an administrator is most useful where the property is of a perishable nature, such as can best be disposed of in the

Citizens' Street Railway Company *et al.* v. Robbins, Administrator.

public market, or such as would probably be sacrificed at a public sale.

In view of the fact that the courts are not in session in many of the counties of the State more than six months in the year, the construction contended for by the appellee would, in a great measure, destroy the usefulness of the statute. Such a construction would render it inconvenient, if not impossible, to sell in the open market. It would be utterly impossible to sell a stock of goods by retail at private sale, however apparent it might be that a public sale would result in a loss to the estate. We are of the opinion that where the order of the court does not require a confirmation, if the sale is made in substantial compliance with the order of the court, the title passes to the purchaser upon his compliance with the terms of the sale. *Hobson v. Ewan*, 62 Ill. 146; *Stowe v. Kimball*, 28 Ill. 93; *Moffitt v. Moffitt*, 69 Ill. 649. Doubtless in all cases the court may, in its discretion, require by its order that the sale shall be reported and confirmed in order to pass title to the property. *Williams v. Perrin*, *supra*.

It is also probably true that where there is any material deviation from the order to sell, no title would pass until such sale was reported and confirmed by the court.

In this case, however, there seems to have been no attempt to comply with the order made for the sale of the stock in controversy at private sale.

The sale was on a credit of ten years, whereas the administratrix had no power to give a credit exceeding twelve months. 2 R. S. 1876, p. 510.

The order of the court required the administratrix to take good and sufficient security for the purchase-price of the stock, but, instead of following the order, she took the individual note of John Carlisle, without security. This attempted sale is no better than if there had been no order of the court. The sale to Carlisle on a credit of ten years, without any security, was not a sale under the order procured

Citizens' Street Railway Company *et al.* v. Robbins, Administrator.

by the administratrix, and was, in our opinion, void, and vested no title.

The Citizens' Street Railway Company had notice that the stock in question belonged to, and was a part of, the estate of Henry H. Catherwood. It also had notice that the Marion Circuit Court had acquired jurisdiction over this property, and had made an order to sell the same at private sale. Indeed, the answer discloses the fact that it had examined the proceedings under which the attempted sale to Carlisle was made. We do not think the company exercised that degree of diligence required by the law, when it stopped with the examination of the order of sale. Before cancelling the stock held by the estate of Catherwood it should have gone further, and ascertained whether such a sale had been made under that order as vested title in Carlisle. It was its duty, before cancelling the stock at the request of Carlisle, and issuing to him stock in lieu thereof, to ascertain that he was the owner of the stock in his possession, and having failed to perform such duty we think it liable to make good any loss occasioned thereby. Before the company could lawfully cancel the stock held by Catherwood's estate it was bound to know, not only that an order of sale had been entered by the court, but that a sale had also been made pursuant to the terms of that order. *Nugent v. Laduke*, 87 Ind. 482; *Weyer v. Second National Bank*, 211, *supra*; *Angell and Ames Corporations* (10th ed.), section 582; *Loring v. Salisbury Mills*, 125 Mass. 138.

In our opinion the Superior Court of Marion county, at special term, erred in overruling the demurrer to the third paragraph of the separate answer of the appellant, the Citizens' Street Railway Company.

The answers of the appellant Johnson present a question entirely different from the one presented by the answer of the Citizens' Street Railway Company.

The certificates of stock owned by the estate of Henry H. Catherwood were cancelled by the company, and a new

Citizens' Street Railway Company *et al.* v. Robbins, Administrator.

certificate in lieu thereof was issued to John Carlisle in his own name. So far as appears there was nothing on the face of the new certificate to put any one on inquiry, or to give notice that it was issued in lieu of the Catherwood stock. In this condition Johnson bought it in the market, without any notice that it had any connection with Catherwood's estate. The question is, therefore, presented as to whether Johnson, under these circumstances, is liable to account to the estate for the stock purchased by him.

Could the appellee show that Johnson, and those through whom he makes his title, had notice of the fact that the Catherwood stock entered into and formed the consideration of the stock purchased by him, doubtless he could follow such consideration, and charge Johnson with it. The complaint seems to proceed upon the theory that it was necessary to charge Johnson with such notice; but as notice is denied by the answers, in considering the demurrer thereto, we must treat the case as one in which he purchased in good faith, without notice.

We are bound to know that stocks of the kind now under consideration constitute a considerable article of the commerce of the country, and that they are daily bought and sold in the market. To hold that where such stock is thrown upon the market, the purchaser must inquire into the antecedents of the same, and into the consideration upon which it was issued by the corporation, would be to destroy the value of such property as an article of commerce. If the property was offered for sale at a market remote from the office of the company, such inquiry would be practically impossible, and hence the stock, in such market, would be of no value.

We are not inclined to adopt the view that a purchaser of such property is bound to make such examination, unless there is something upon the face of the stock, or something connected with the transaction, to put him on inquiry. Of course everyone purchasing such stock takes the chances as

Citizens' Street Railway Company *et al.* v. Robbins, Administrator.

to whether it is genuine, and as to whether the corporation had the legal authority to issue it, but where the stock is issued by a corporation having the legal authority to do so, is genuine and is regular upon its face, we think a purchaser in good faith, without notice of infirmities which could be ascertained only by an examination of the records of the company, should be protected. *Salisbury Mills v. Townsend*, 109 Mass. 115; *Machinists' Nat'l Bank v. Field*, 126 Mass. 345; *Mount Holly, etc., T. P. Co. v. Ferree*, 17 N. J. Eq. Rep. 117.

But in this case Johnson did not purchase the certificates of stock owned by Catherwood. Those certificates were cancelled by the Citizens' Street Railway Company.

The stock purchased by Johnson was evidenced by new certificates issued to John Carlisle by the company in consideration of the surrender and cancellation of the certificates held by Catherwood at the time of his death. As to whether the company was authorized to issue the certificates purchased by Johnson, and whether they are valid, are questions between him and the company, and one into which we need not inquire in this case.

But as he did not purchase the stock evidenced by certificates once held by Catherwood, and had no notice that such stock ever existed at the time of his purchase, we think it follows that he is in no way liable to Catherwood's estate.

In the case of *Salisbury Mills v. Townsend*, *supra*, it was expressly held that a purchaser of such stock was not bound to examine the books of the corporation, or look beyond the certificates assigned to him, in search after the validity of former assignments.

In cases like this, where the old certificates have been surrendered and a new one issued in lieu thereof, the doctrine is that the remedy is against the corporation issuing the new certificate, and that a purchaser of the stock represented by the new certificate in good faith, for value, and without notice of any illegality in the surrender and cancellation of the

Citizens' Street Railway Company *et al.* v. Robbins, Administrator.

original certificates will be protected. *Pratt v. Taunton Copper Mfg. Co.*, 123 Mass. 110; *Machinists' Nat'l Bank v. Field*, *supra*; *Allen v. South Boston R. R. Co.*, 15 Am. St. Rep. 185.

In our opinion the court at special term did not err in overruling the demurrer to the third and fourth paragraphs of the answer of the appellant Johnson.

A question is also made as to the ruling of the court at special term in admitting in evidence a report made out and sworn to by the administratrix, in which she states that she had sold the stock in question to John Carlisle for cash.

The report, so far as the evidence in the cause discloses, was never filed or approved by the court. In this condition it amounts to the mere declaration of the administratrix, and constitutes no part of the record in the proceeding to sell the stock. But, assuming without deciding, that it was not proper evidence in the cause, we do not think the appellee, who objected to its introduction, stands in a situation to make such objection. This paper is set out in full in each paragraph of the amended complaint, and is thus made a part of the record in this cause. As it was already a part of the record, and was, as such, before the court, we do not see how the appellee could be injured by allowing the appellants to read it to the court.

In our opinion the superior court, at general term, did not err in reversing the judgment of the special term as to the appellant the Citizens' Street Railway Company, but it did err in reversing the judgment as to the appellant Johnson.

The judgment of the superior court as to the appellant the Citizens Street Railway Company is affirmed, and said judgment as to the appellant Tom L. Johnson is reversed.

Filed Jan. 6, 1891; petition for a rehearing overruled June 11, 1891.

No. 14,916.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. HENDRICKS.

RAILROAD.—Fencing Track.—Duty as to.—Violation of Duty.—Injury to Passenger.—A railroad company must take measures to so fence its track as to prevent animals from running upon it. If the duty to fence is negligently violated, and the violation of duty is the proximate cause of injury to a passenger, his right of action is clear and complete.

SAME.—Accident to Passenger.—Presumption of Negligence.—Burden of Removing.—The burden of proof is upon a railroad company to remove the presumption of negligence which arises from the happening of an accident which causes injury to a passenger.

EVIDENCE.—Conflicting.—Verdict not Disturbed.—Where there is a conflict of evidence upon a disputed question of fact, the decision of the trial court will not be disturbed.

WITNESS.—Non-Expert.—Speed of Train.—A non expert witness may give an opinion as to the speed at which a train was moving.

NEW TRIAL.—Surprise.—Where a party proceeds with a trial, fully cross-examines the witness whose testimony creates the alleged surprise, and takes the chance of a verdict, he can not have a new trial on the ground that he was surprised by the testimony, without showing a very strong and clear case.

SAME.—Misconduct of Jury.—When Communication to Court is not.—After a jury had been deliberating for some hours they sent by the bailiff to the court a communication as follows: "The jury stand eleven to one. We have stood that way all night. No hope of a verdict." The communication was shown to the plaintiff's attorneys. The misconduct of the jury, if misconduct at all, was not such as to entitle the defendant to a new trial. The misconduct of a jury must be gross, and clearly result in an injury to the complaining party, to justify the awarding of a new trial.

From the Jackson Circuit Court.

C. C. Matson and E. C. Field, for appellant.

S. B. Voyles, W. K. Marshall, J. A. Zaring and M. B. Hottel, for appellee.

ELLIOTT, J.—The appellee was a passenger on one of the trains of the appellant; the train in which he took passage was thrown from the track and he was severely injured. The appellant's employees ran the train against a cow which

128	462
135	71
128	462
145	679
147	379
128	462
155	92
155	94
155	95
128	462
157	270
128	462
163	365
128	462
165	679

The Louisville, New Albany and Chicago Railway Co. v. Hendricks.

had entered upon the track, and the collision caused the train to leave the rails.

A witness who had lived near the railroad and had often seen trains in motion was permitted to give an opinion as to the rate of speed at which the train was running at the time the cow was struck. In this ruling there was no error. A non-expert witness may give an opinion as to the speed at which a train was moving. Possibly the testimony of a non-expert may be of less value than that of an expert, but that proves nothing to the purpose, for here the question is whether the evidence should be heard, not what weight should be assigned it. The authorities give full support to our conclusion that the testimony was competent. *Louisville, etc., R. W. Co. v. Jones*, 108 Ind. 551; *Evansville, etc., R. R. Co. v. Crist*, 116 Ind. 446 (457), and authorities cited; *Lawson Expert and Opinion Evidence*, 462; *Rogers Expert Testimony* (2d ed.), 244.

The duty of a railroad company engaged in carrying passengers has so often been defined that it is unnecessary to do more than state in bare outline what that duty is, and this we do by saying that it is bound to exercise the highest degree of practicable care to keep its track, machinery and appliances in a safe condition for use. This duty requires it to take measures to so fence its track as to prevent animals from wandering upon it. Many decisions affirm that the statutes imposing upon railway corporations the duty of fencing their tracks are valid because they are enacted under the police power, and are intended to protect persons travelling upon the railroads of the country. If the duty to fence is negligently violated, and the violation of duty is the proximate cause of injury to a passenger, his right of action is clear and complete. A violation of a statutory duty has often been adjudged to give a traveller upon a highway a right of action against a railroad company, and, beyond controversy, such a breach of duty must give a right of action where the relation of carrier and passenger exists. It is the

The Louisville, New Albany and Chicago Railway Co. v. Hendricks.

relation of carrier and passenger which creates the high duty that rests upon the appellant, and brings the case within the strong and salutary rule that the law has established for the protection of travellers who intrust themselves to the care of common carriers. The rule to which we refer is the one that imposes upon the carrier the burden of removing the presumption of negligence which arises from the happening of an accident which causes injury to a passenger. This case illustrates the wisdom and justice of the rule. A passenger can not, in reason, be expected or required to ascertain the condition of the fences along the line of the carrier's track, for the matter is one peculiarly within the knowledge of the carrier. It must be true that it is a matter within the peculiar knowledge of the carrier, or else it must be true that the carrier remained ignorant and inactive where it was its imperative duty to be active and vigilant. It is, at all events, no more than reasonable and just to require of the company, in such a case as this, an explanation of the cause of the accident, and such an explanation, too, as will show that it was not in fault. In this instance it was its duty to show, at least that the fences were reasonably secure, and that it did use care and diligence to make such fences as would prevent domestic animals from straying on the track. The rule to which we refer was thus expressed in *Louisville, etc., R. W. Co. v. Jones, supra*: "When the plaintiff made it to appear that she was a passenger upon appellant's train, and while being carried as such, the car in which she was seated left the track and she suffered injuries thereby, she had shown a state of things upon which a presumption of negligence arose against the railroad company, which stood with the force and efficiency of actual proof of the fact, and was available for her benefit until negatived and overthrown, and such presumption can only be overthrown by proof that the casualty 'resulted from inevitable or unavoidable accident, against which no human skill, prudence or foresight, as usually and

The Louisville, New Albany and Chicago Railway Co. v. Hendricks.

practically applied to careful railroad management, could provide.' ”

In many cases the doctrine declared in the opinion from which we have quoted has been asserted. *Memphis, etc., Co. v. McCool*, 83 Ind. 392; *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346, and authorities cited; *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264; *Bedford, etc., R. R. Co. v. Rainbolt*, 99 Ind. 551; *Anderson v. Scholey*, 114 Ind. 553; *Louisville, etc., R. W. Co. v. Pedigo*, 108 Ind. 481; *Louisville, etc., R. W. Co. v. Snyder*, 117 Ind. 435.

In view of the rule that it was incumbent upon the appellant to show that it was not negligent, or that it did not omit to do what the law requires it to do to protect its track, there can be no doubt that the verdict is fully and strongly supported by the evidence.

The appellant claimed a new trial upon the ground that it was surprised by the testimony of a witness named De Ford. We do not deem it necessary to do more than refer to some of the decisions upon the subject of surprise, and to say that where a party proceeds with the trial, fully cross-examines the witness whose testimony creates the alleged surprise, and takes the chance of a verdict, he can not have a new trial without showing a very strong and clear case, and that no such case is here shown. *Lockwood v. Rose*, 125 Ind. 588; *Scheible v. Slagle*, 89 Ind. 323; *Pittsburgh, etc., R. W. Co. v. Sponier*, 85 Ind. 165; *Sullivan v. O'Conner*, 77 Ind. 149; *Chamberlain v. Reid*, 49 Ind. 332; *Brownlee v. Kenneipp*, 41 Ind. 216; *Cummins v. Walden*, 4 Blackf. 307; *Travis v. Barkhurst*, 4 Ind. 171; *Ruger v. Bungan*, 10 Ind. 451.

The cases to which we have referred decide all the questions arising upon the cause assigned upon the testimony of De Ford, as well as those assigned upon the testimony of Rudder, and we do not feel that we should be justified in

Newlon v. Tyner.

discussing questions that have been so often and so fully considered.

As to the question of fact made by the affidavits and counter-affidavits, it is sufficient to say that where there is a conflict of evidence upon a disputed question of fact the decision of the trial court will not be disturbed. *Schnurr v. Stults*, 119 Ind. 429; *Epps v. State*, 102 Ind. 539; *Long v. State*, 95 Ind. 481; *De Priest v. State*, 68 Ind. 569; *Holloway v. State*, 53 Ind. 554; *Carter v. Ford Plate Glass Co.*, 85 Ind. 180.

After the jury had been deliberating for some hours, they sent, by their bailiff, to the court the following written communication: "The jury stand eleven to one. We have stood that way all night. No hope of a verdict." This communication was shown to the plaintiff's attorneys. The alleged misconduct of the jury was, if misconduct at all, not such as to entitle the appellant to a new trial. In the case of *Long v. State*, *supra*, it was said: "Another general rule is that the misconduct of the jury must be gross, and clearly appear to have injured the complaining party, to justify the granting of a new trial." Many cases are cited in support of this conclusion, and to those cited many may easily be added. That the alleged misconduct did the appellant no harm is too clear to require discussion.

Judgment affirmed.

Filed June 11, 1891.

No. 14,765.

NEWLON v. TYNER.

128 466
151 516

PRACTICE.—*Objections to Evidence.*—*Vouchers.*—*Submission to Expert Witnesses.*—*Motion to Strike Out.*—Where the defendant submits to the plaintiff's expert witnesses checks and vouchers, not papers in the cause, which purport to be in the genuine handwriting of the defendant, but which were not, in fact, in his handwriting, and did not bear his genu-

Newlon v. Tyner.

ine signature, and cross-examines the witnesses as to their genuineness, without objection on the part of the plaintiff, and the plaintiff re-examines the witnesses as to such checks and vouchers, no question of the competency of the evidence is presented by a motion to strike out.

From the Clinton Circuit Court.

J. N. Waugh, J. P. Kemp and J. V. Kent, for appellant.

G. H. Gifford, J. M. Fippen, S. O. Bayless, R. P. Beauchamp and W. W. Mount, for appellee.

OLDS, C. J.—This is an action brought by the appellant against the appellee to recover \$10,000 damages alleged to have been sustained by reason of the appellee having debauched and carnally known the wife of the appellant.

Issues were joined and there was a trial had, resulting in a verdict and judgment in favor of the appellee.

The sole question sought to be presented, and which is discussed, relates to the admission of evidence. It became a vital question in the case as to whether or not the appellee had written certain letters which were offered in evidence, and which, if written by the appellee, tended strongly to establish his intimacy with the wife of the appellant. The appellee denied having written the letters.

The appellant called some nine or more expert witnesses to testify, some of whom were acquainted with appellee's handwriting, and all of whom showed themselves competent to speak upon the question, and who had made an examination of the disputed letters, and compared the writing with other writings of the appellee admitted to be genuine, and the witnesses testified and gave their opinion that they were written by the same person and by the appellee. On cross-examination of these witnesses counsel for the appellee placed in the hands of each of them what purported to be genuine checks on a bank, signed by appellee, and vouchers in an estate purporting to have been written by the appellee, and examined each of said witnesses as to their opinion in regard to such checks and vouchers having been written

Newlon v. Tyner.

by the same person who wrote the other writings in regard to which they had been questioned in chief, and some, if not all of said witnesses, testified that they were written by the same person.

The cross-examination of all of said witnesses proceeded to the close without objection on the part of the appellant, and they were re-examined in regard to such checks and vouchers by counsel for appellant.

After the appellant had introduced all of his evidence in chief in support of his complaint, and just previous to resting his case, he filed his motion "to strike out and take from the consideration of the jury each and every question and each and every answer to such question respectively and severally asked by the defendant's counsel on cross-examination of witnesses presented by the plaintiff, as to the several bank checks purporting on their face to have been executed by William J. Tyner, or William J. Tyner, guardian, and designated in this cause as exhibits 1, 2, 3, 4, 5, 6 and 7, and also what purports to be vouchers in the Cox estate, purporting to be signed by M. A. Pershing, and being noted in the evidence as exhibits 8, 9, 10, 11 and 12, and the cross-examination as to each of them separately and severally for the following reasons," stating numerous specific reasons in support of the motion.

The court overruled the motion, and the appellant excepted.

The question of the competency of this evidence, and as to whether it was proper cross-examination, is fully and ably discussed by counsel, but before considering the question as to the competency of the evidence, it must first be determined whether or not the question of the competency of the evidence is presented by the motion to strike out in such a way that it was error for the court to overrule the motion. If no such question is presented by this motion, then the question of its competency is not before us to pass upon.

If, during the cross-examination, the appellant had objected

Newlon v. Tyner.

to the exhibition of the checks and vouchers to the witness, or objected to questions propounded in relation thereto, and if his objection had been overruled and exceptions reserved to the ruling, and he had assigned the ruling as grounds for a new trial in his motion, the question of competency would have been presented, but it does not appear that any objection was made to the cross-examination.

Objections to the competency of evidence ought to be seasonably made.

To hold that the question as to the competency of this evidence is properly presented by the motion to strike out in this case is to establish a principle and rule of practice by which counsel may sit by and permit the cross-examination of a score or more of witnesses as to illegitimate facts without objection to a single question, and re-examine as to the same, intermingling the incompetent with the competent, and if at the end of a day or a week's examination he concludes the evidence is detrimental to him, he can move to strike it out, and the court must sustain the motion or it will constitute reversible error. We do not think this is proper practice.

When a question is propounded, if it is incompetent, if counsel desire to save any question in regard to it, he should interpose an objection, and state specifically his grounds of objection. If it be answered before there is an opportunity to object, or if the question be competent and the answer incompetent, then the competency of the evidence may be properly presented by a motion to strike out. The competency of testimony may be presented by proper objection to a question, or by a motion to strike out if the motion be seasonably made.

We do not intend to be understood that counsel must follow every incompetent question relating to a particular line of evidence with an objection in order that he be in position to avail himself of the error in its admission.

When an objection is made and overruled to a question

Newlon v. Tyner.

eliciting a certain line of evidence, and an exception is reserved, it is just as available for the reversal of a judgment as if it was repeated every time the same or a similar question was propounded to any witness. But what we do hold is that where, as in this case, a party permits the examination or cross-examination of a number of witnesses, eliciting from each of them certain evidence of the same character without objection, and cross-examines or re-examines such witnesses as to such matter, he can not wait until after such examination has concluded, and all of that character of evidence has been elicited, and then present a motion to strike it out, and avail himself of an erroneous ruling on the motion to reverse the cause. If he desires to present a question as to the competency, he must do so while the evidence is being introduced; if he does not he waives any objection to it, unless it be in a case where its competency or incompetency depends upon some fact developed subsequently to the introduction of such evidence. This doctrine has been heretofore enunciated by this court.

In the case of *Brown v. Owen*, 94 Ind. 31, it is said: "It is insisted that the court below erred in refusing to strike out certain questions and answers. It is a sufficient answer to this to say that no objections having been made to either questions or answers, the objection by a motion to strike out comes too late." *McCarty v. Waterman*, 96 Ind. 594; *Jones v. State*, 118 Ind. 39.

The papers exhibited to the witnesses are designated as exhibits, and do not appear to have been introduced in evidence, at least we are not referred to any part of the voluminous record in the case where such checks and vouchers had been offered or admitted in evidence prior to the making of the motion to strike out the evidence. The part of the record referred to only shows that counsel exhibited them to and placed them in the hands of the witnesses on cross-examination, nor did it appear that up to the filing of the motion to

Newlon v. Tyner.

strike out any evidence was offered to show whether they were, or were not, genuine.

The motion to strike out the evidence came too late in this case to present any question as to the competency of the evidence, and therefore we do not consider the question of its competency.

There is no error in the record.

Judgment affirmed, with costs.

Filed April 4, 1891.

ON PETITION FOR A REHEARING.

OLDS, J.—Counsel are so earnest in their appeal for a rehearing in this case that we feel like adding a word in addition to what we have said in our original opinion. Counsel exhibit a great deal of warmth in their argument against the opposing counsel in the case, and seem to feel that an advantage was gained by a trick in the trial of the cause, and that the opinion in this case gives license to an unfair practice. In this counsel are very much in error. It must be presumed, in favor of the trial court, that if anything had occurred by which one party had gained an advantage by a trick, or unfair practice, as counsel characterizes the conduct of opposing counsel in this case, the trial court would have righted the wrong by setting aside the submission, or granting a new trial. This court, by its decision, gives no countenance to unfair practices. A proper result seems to have been reached under the evidence. The wrong and error complained of by counsel are on account of the court permitting counsel for appellee, on cross-examination of appellant's expert witnesses, to submit checks and vouchers to them which purported to be in the genuine handwriting, and signatures of the appellant, but which were not, in fact, in his handwriting, and did not bear his genuine signature, and to cross-examine the witnesses in regard to them, and take their opinion as to their genuineness. They were not papers in the case, and such examination was not proper, unless

Austin v. Davis *et al.*

they were admitted by the appellant to be genuine; and it was the duty of the appellant and his counsel to ascertain definitely as to their genuineness before permitting such examination, or allowing them to be treated as genuine, and such examination to proceed. It is the duty of counsel to be vigilant. If an objection had been interposed the examination would not have been proper. *Hazzard v. Vickery*, 78 Ind. 64; *Shorb v. Kinzie*, 80 Ind. 500; *Cox v. Dill*, 85 Ind. 334.

We did not say, in the original opinion, what we have now said, as no good could come of saying it, and we have only added what we now say by reason of the earnestness with which counsel have urged their petition, and because they seem to feel that their case had been hastily considered, though in this they are in error.

The petition for a rehearing is overruled.

Filed June 11, 1891.

No. 15,337.

AUSTIN v. DAVIS ET AL.

128	472
152	375

128	472
166	109

CONTRACT.—*Statute of Frauds.*—*Correspondence.*—If a contract which comes within the statute of frauds can be extracted from correspondence between the parties upon the subject of the contract, the statute is satisfied.

SAME.—*Agreement to Make Child an Heir.*—*Transfer of Property.*—*Trust.*—*Married Woman.*—*Void Contract.*—*Ratification.*—*Statute of Frauds.*—*Part Performance.*—Where a childless husband and wife, in consideration that a young girl should be surrendered to them, agreed to take her as their own child, provide for her and bring her up as their own, and at their death leave her all their property, and the husband afterwards adopted the child, to which the wife assented,

Held, that the husband was not restrained by the contract in the en-

Austin v. Davis *et al.*

joyment of his property, and that he could dispose of it as he pleased during his life, by gift or otherwise.

Held, also, that a conveyance in good faith in his lifetime of all his property to his wife vested in her an absolute title to the property, it not being charged with any trust in favor of the girl.

Held, also, that the contract was void as to the wife, because of her coverture when it was entered into, and incapable of ratification.

Held, also, that a new verbal contract made by the wife after the death of the husband was within the statute of frauds, and a part performance on the part of the girl did not take it out of the statute.

From the Marion Circuit Court.

U. J. Hammond and *E. S. Rogers*, for appellant.

T. S. Rollins, for appellees.

COFFEY, J.—The complaint in this cause consists of three paragraphs.

The material allegations in the first paragraph are, substantially, that in the year 1868, when the appellant was four years of age, John S. Johnson and Elizabeth D. Johnson, husband and wife, without children, and residing in the city of Indianapolis, proposed, in writing, to the mother of the appellant, then living alone with the appellant at the town of Neoga, in the State of Illinois, that if the said mother would surrender to them the appellant they would take her as their own child, provide for her and bring her up as their own, and at their death leave her all their property; that said proposition was contained in a letter written to the mother of the appellant by the said Elizabeth D. Johnson, and signed by her for her said husband, John S. Johnson, and herself; that the letter is lost and a copy can not be filed with the complaint; that said proposition was accepted and the custody of appellant surrendered to the said Johnson and Johnson; that in the year 1869 said John S. Johnson, by proceedings in the proper court, adopted the appellant as his daughter, and she thereupon took upon herself the name of Johnson; that the said Elizabeth Johnson was present in court at the time said proceedings were had

Austin v. Davis et al.

and gave her assent thereto, and thereafter promised the mother of the appellant that she would treat appellant as her daughter; that thereafter the appellant remained with said Johnson and Johnson, rendering to them all the duties, affection and obedience due from a natural child until she was eighteen years of age, when, with their consent and approval, she intermarried with Charles Austin, which marriage occurred in the year 1882, and that during the time she so lived with them she was treated as their daughter; that the said John S. Johnson departed this life intestate on the 6th day of April, 1887, having disposed of his property to the said Elizabeth D. Johnson while yet in life, and leaving no children except the appellant; that the said Elizabeth D. Johnson at all times, up to the time of her death, treated the appellant as her daughter, and declared that she desired the appellant to have all her property after her death; that the said Elizabeth D. Johnson died intestate on the 8th day of March, 1888, leaving no issue of her body nor the descendants of any issue, but leaving the appellant, whom she had, up to the time of her death, reared, trained and loved and held out to the world as her child, and whom she had declared, up to the time of her death, she desired to take and have all her property, both real and personal; that the appellees claim to be the heirs of the said Elizabeth D. Johnson, and deny the right of the appellant to any portion of the property owned by the said Elizabeth at the time of her death.

This paragraph contains a description of the real estate owned by Elizabeth D. Johnson at the time of her death, and alleges that the personal estate amounts to the sum of nine hundred dollars, and prays that the right of the appellant to said property be ascertained and fixed by a proper decree.

The second paragraph of the complaint, in legal effect, does not differ materially from the first paragraph, except in that it alleges that Elizabeth D. Johnson was in court at

Austin v. Davis et al.

the time the record was made adopting the appellant by John S. Johnson, and believed herself to be a party thereto and to be bound thereby, and that she died in that belief; that the property conveyed by John S. Johnson to his wife, the said Elizabeth D. Johnson, was a voluntary conveyance and without any consideration whatever, and at the time she took the same she had full knowledge of the obligations of the said John S. Johnson to the appellant under the terms of said contract.

No question is made in this court in relation to the third paragraph of the complaint, and we need not, for that reason, state its contents.

The circuit court sustained a demurrer to each paragraph of the complaint, and the propriety of that ruling is called in question by a proper assignment of error.

This is not an action by the appellant to recover damages for a breach of the contract set up in the complaint, nor is it an action to recover the value of services rendered by the appellant to John S. Johnson and Elizabeth D. Johnson, but the complaint is constructed upon the theory that the appellant is entitled to specific performance.

It has been decided by this court that where a childless husband and wife, in consideration that a young girl should live with them until the death of both, in all respects as their own child, and render such services as she was capable of doing, orally agreed to make her their heir, and at their death, or the death of the survivor, to will her the entire estate of which they were possessed, consisting, at the death of the survivor, of real estate, and also of personal property exceeding in value fifty dollars, the agreement was within the statute of frauds, and that a performance on the part of the girl did not take it out of the statute. *Wallace v. Long*, 105 Ind. 522, and authorities there cited.

It is sought by the complaint before us to take the case at bar out of the rule announced in this case by alleging that the contract was embodied in a letter written to the mother

Austin v. Davis *et al.*

of the appellant. If a contract which comes within the statute of frauds can be extracted from correspondence between the parties upon the subject of the contract, the statute is satisfied. *Wills v. Ross*, 77 Ind. 1; *Thames, etc., Co. v. Beville*, 100 Ind. 309.

The allegations in relation to the letter, resulting in the contract set up in the complaint, are somewhat vague and uncertain. We are left in doubt as to whether the name of John S. Johnson was signed to the letter which it is alleged was written to appellant's mother.

It is not alleged that John S. Johnson wrote the letter, but the allegation is that it was written by his wife, and signed by her for her husband and herself. Assuming, however, that the letter was of such a character as to bind John S. Johnson, we are confronted with the question as to what were his duties and obligations under the terms of the contract contained therein.

It bound him to leave to the appellant whatever property he might possess at the time of his death. This he could do in two ways, namely :

First. By adopting the appellant, so that she would take the property by inheritance from him.

Second. By the execution of a will, in proper legal form, so as to bequeath to her his property.

He chose to adopt the first mode, but before his death he conveyed and transferred, or caused to be conveyed and transferred, all his property to his wife, Elizabeth D. Johnson, and at the time of his death had no property which the appellant could inherit from him.

All the authorities agree that such a contract as the one now under consideration left John S. Johnson perfectly free and unrestrained in the enjoyment of his property, and that he could dispose of it as he pleased, at any time during his life, by gift or otherwise. *Van Duyne v. Vreeland*, 12 N. J. Eq. 142; *Jeremy Equity* (1st Am. ed.) 401; 1 Story Eq. Jur., section 382.

It is not claimed that the transfer made by John S. Johnson to his wife was made for the purpose of defrauding the appellant, and we must presume, therefore, that it was made in good faith, and for some lawful purpose.

Under these facts it can not be successfully maintained that John S. Johnson was guilty of any breach of the contract set out in the complaint. Nor are we able to perceive how it can be successfully maintained, by any process of legitimate reasoning, that the property of John S. Johnson became charged with any trust, since he was at liberty to dispose of it at his pleasure. Ordinarily, one who holds property in trust for another must keep it for the benefit of the *cestui que trust*. It would be idle to say that one has the legal right to dispose of his property in such manner as to him seemed best, even to making a donation of it, and at the same time say that the person taking it took it subject to a trust which might, in certain contingencies, be enforced.

We are not inclined to adopt the contention of the appellant that the property of John S. Johnson became charged with a trust in favor of the appellant, and that Elizabeth D. Johnson took it subject to such trust.

As John S. Johnson possessed the undoubted right to dispose of his property, we think his wife took the absolute title to the same free from any charge against it on account of any contract made by him with the appellant.

And this brings us to a consideration of the obligations and duties of Elizabeth D. Johnson under the contract in suit. At the time the contract was entered into she was a married woman, and the contract as to her was void for want of power in her to bind herself by such a contract. *Long v. Brown*, 66 Ind. 160; *Hodson v. Davis*, 43 Ind. 258; *O'Daily v. Morris*, 31 Ind. 111; *Johnson v. Tutewiler*, 35 Ind. 353; *Maher v. Martin*, 43 Ind. 314.

It is contended by the appellant that under the facts stated in the complaint it must be held that Mrs. Johnson, after she ceased to be a married woman, ratified the contract made by

Austin v. Davis *et al.*

her while under coverture, or that she made a new contract.

It appears by the complaint that the appellant became a married woman prior to the death of John S. Johnson, and while it does appear that she, subsequent to his death, resided with Mrs. Johnson under the same roof, she could not occupy that relation which she occupied prior to her marriage.

Furthermore, it is a general principle of law that a void contract can not be ratified, and this principle has been held to apply to the contracts of married women. *Long v. Brown, supra*. In this case it was said by this court, speaking of the contract of a married woman then in suit: "Such contract is not susceptible of ratification. Nothing short of a new, valid and binding contract, made after the death of her husband, upon a new consideration, can operate as a contract to deprive her of her interest in the land."

It is not claimed that Elizabeth D. Johnson made any new written contract after the death of her husband. If she made any contract at all it was a verbal one. As we have seen such a contract is within the statute of frauds and can not be enforced. *Wallace v. Long, supra*.

The appellant relies upon the case of *Van Tine v. Van Tine*, 13 Cen. Rep. 354, and the cases of *Sharkey v. McDermott*, 16 Mo. App. 80, and *Sharkey v. McDermott*, 91 Mo. 647. In each of these cases it was held that performance on the part of the child was sufficient part performance to take the case out of the statute of frauds. This is in direct conflict with *Wallace v. Long, supra*, and *Johns v. Johns*, 67 Ind. 440.

We can not follow the case of *Van Tine v. Van Tine, supra*, and the cases of *Sharkey v. McDermott, supra*, without overruling the case of *Wallace v. Long, supra*, and the cases upon which it rests. To hold that specific performance could be had in this case, as to the real estate of which Mrs. Johnson died seized, there being no valid written contract between the appellant and Mrs. Johnson, and no pos-

Parsons v. Pierson *et al.*

session of such real estate having been surrendered under the contract, would also be in conflict with the cases of *Atkinson v. Jackson*, 8 Ind. 31, *Watson v. Mahan*, 20 Ind. 223, *Lafollett v. Kile*, 51 Ind. 446; *Law v. Henry*, 39 Ind. 414, *Stater v. Hill*, 10 Ind. 176; *M Ireland v. Lemasters*, 4 Blackf. 383; and *Arnold v. Stephenson*, 79 Ind. 126.

In our opinion the court did not err in sustaining the demurrer to the complaint before us.

Judgment affirmed.

Filed March 12, 1891; petition for a rehearing overruled June 12, 1891.

No. 15,109.

PARSONS v. PIERSON ET AL.

JUDGMENT.—*Justice of the Peace.—Irregularities.—Relief.—Injunction.—Appeal.*—Injunction will not lie to restrain the collection of a judgment rendered by a justice of the peace because of irregularities occurring at the trial. The remedy is by appeal.

From the Floyd Circuit Court.

C. D. Kelso and J. V. Kelso, for appellant.

ELLIOTT, J.—The appellant alleges in his complaint that the appellee Pierson brought an action against him, before a justice of the peace; that the parties appeared; that upon the appellant's request a jury was called; that the evidence was heard; that the foreman of the jury orally announced a finding against the appellant; that no written verdict was returned; that the justice entered judgment for the sum named by the foreman of the jury. Prayer for an injunction restraining the collection of the judgment.

The appellant had an adequate legal remedy, and can not have relief by injunction. His remedy was by appeal.

Judgment affirmed.

Filed June 16, 1891.

The State, *ex rel.* Reese, *v.* Bogard.

No. 16,091.

THE STATE, EX REL. REESE, *v.* BOGARD.

TOWNSHIP TRUSTEE.—*Right to Hold Over.*—Under the provisions of the act of March 11th, 1889 (Acts 1889, p. 425), a person who had held the office of township trustee for two terms consecutively, at the date of the township election, in April, 1890, was entitled to hold over until his successor was duly elected and had qualified. He would have been ineligible to hold the office by virtue of a new election, as the above act provides that no person shall be eligible to the office of township trustee more than four years in any period of eight years, but this would not prevent his holding over after the close of his second term, until his successor was elected and qualified. Const., art. 15, section 3.

From the Greene Circuit Court.

T. Hanna, J. D. Alexander, H. W. Letsinger, J. T. Hays and *H. J. Hays*, for appellant.

W. W. Moffett, C. E. Davis, E. Short and *T. Van Buskirk*, for appellee.

MILLER, J.—At the township election held in April, 1886, the appellee was elected township trustee of Washington township, of Greene county, Indiana, for the term of two years, and at the election held in April, 1888, he was re-elected to the same office.

At the township election held in April, 1890, the appellant and one John Callahan were candidates for this office, each receiving an equal number of votes.

The board of canvassers neglected to determine by lot which one of the candidates was entitled to the office, and no certificate of election was given to either of them.

At the December term, 1890, of the board of commissioners of the county, an order was made declaring that a vacancy existed in the office, and appointing the relator, Reese, as such trustee to fill the vacancy.

The appellee refused to deliver to him the books and papers of the township, claiming to hold over until his successor was elected and qualified.

128	480
144	237
128	480
148	166
151	269
151	273
151	559
128	480
167	20
167	21

The State, *ex rel.* Reese, v. Bogard.

This action was brought to recover the possession of the office and for damages.

A demurrer was sustained to the information, the relator stood on the demurrer, and final judgment was rendered against him for costs.

The sufficiency of the complaint is the only question presented to us for decision.

The question at issue involves the construction to be given to section 1391 of Elliott's Supp. (Acts 1889, p. 425), which is as follows :

"Any person who has held the office of township trustee of any township in this State for two terms consecutively at the date of the next township election in April, 1890, shall not be eligible to said office for the next ensuing term ; and thereafter no person shall be eligible to the office of township trustee more than four years in any period of eight years."

The appellant claims that, inasmuch as the appellee had served two consecutive terms prior to the election in April, 1890, he was disqualified from holding longer ; and, no one having been elected and qualified to take his place, a vacancy existed, which the board of commissioners were authorized to fill by appointment. In support of their position they cite *Gosman v. State, ex rel.*, 106 Ind. 203.

It was provided by the act in force when the appellee was elected, that he should, by virtue of such election, hold his office for two years, and "until his successor is elected and qualified." Section 5991, R. S. 1881.

Our State Constitution contains the following provision : Article 15, section 3. "Whenever it is provided in this Constitution, or in any law which may be hereafter passed, that any officer, other than a member of the General Assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for

The State, *ex rel.* Reese, v. Bogard.

such term and until his successor shall have been elected and qualified."

From this it appears that when the appellee was elected and qualified in April, 1888, he was to hold the office for the period of two years, and until his successor was elected and qualified.

The question we are required to examine and pass upon is, did the act of 1889, *supra*, render him ineligible to hold after the expiration of his second term, until his successor should be elected and qualified?

It is settled that the appellee would have been ineligible to hold the office by virtue of a new election. *State, ex rel., v. Johnson*, 100 Ind. 489; *State, ex rel., v. Gallagher*, 81 Ind. 558; *State, ex rel., v. Adams*, 65 Ind. 393; *Jeffries v. Rowe*, 63 Ind. 592. But this is not the question, or decisive of the question, under consideration.

As has been observed, the appellee by virtue of the provisions of the Constitution and statute was elected to hold the office until a successor should be elected and qualified, and in the absence of any act or omission on his part disqualifying him from continuing in office, he is entitled to hold it until such successor has been elected and qualified, unless the statute of 1889 has rendered him ineligible.

The office of township trustee not being a constitutional office, but the creature of the Legislature, it was within the power of the Legislature to provide who should be eligible to hold the office, fix the length of their term, or, if it so desired, to abolish the office altogether.

The language used in the section above quoted, declaring the ineligibility, is that he shall not be "eligible to said office for the next ensuing term."

It is provided in the same act that township trustees were thereafter to hold for the term or period of four years, and until their successors are elected and qualified. Construing these two provisions together, it appears that it was the purpose of the Legislature to prevent an elector from holding

The State, *ex rel.* Reese, v. Bogard.

by election a new and additional term of four years, after having held the office for two consecutive terms immediately preceding the election held in April, 1890.

An officer, after his term of office has expired, while holding until his successor is elected and qualified, is not usually designated as holding a "term" of the office, but as holding over. The words, "for the next ensuing term," are words of limitation, for without their use the act would have contained a positive declaration of ineligibility to hold after the expiration of the second term.

We are not to presume, unless the wording of the act drives us to the conclusion, that the Legislature intended to establish a rule for the tenure of office of township trustees different from that prescribed in the Constitution. The act in question was, evidently, not enacted to regulate the tenure of officers holding over.

If the exposition of this section contended for by the appellant is the correct one, the office of trustee in this township became vacant in April, 1890, at the expiration of the second term. By the act of March 9th, 1889 (Elliott's Supp., section 1395), the term of office of a trustee elected in April, 1890, did not commence until August of that year, thus leaving a period from April until August in which no one elected by the people could hold the office. We take it that this is a persuasive argument that the Legislature did not intend to interfere with the law allowing trustees to hold over until some one properly elected by the people qualifies and demands the office.

The conclusion to which we have arrived renders it unnecessary for us to examine or pass upon the soundness of the rule of construction applied to two provisions of our State Constitution in *Gosman v. State, ex rel., supra*.

We find no error in the record.

Judgment affirmed.

Filed June 17, 1891.

Berry, Adm'r, v. The Louisville, Evansville and St. Louis Railroad Co.

No. 15,064.

**BERRY, ADMINISTRATOR, v. THE LOUISVILLE, EVANSVILLE
AND ST. LOUIS RAILROAD COMPANY.**

PARENT AND CHILD.—*Minor Child.*—*Negligent Killing of.*—*Action by Father as Administrator.*—*When not Maintainable.*—*Emancipation of Child.*—A father can not maintain an action as administrator of his deceased minor son to recover damages for the alleged negligent killing of his intestate unless there has been an emancipation of the infant. An averment in the complaint that at the time of his death said decedent was not, and for two months theretofore had not been, in the service of his parents, or either of them, is not sufficient to show such an emancipation.

From the Dubois Circuit Court.

W. R. Gardiner, S. H. Taylor and J. F. Tieman, for appellant.

— *Brown, — Humphrey and — Davie, for appellee.*

MCBRIDE, J.—This was a suit by the appellant, John Berry, as administrator of his deceased minor son, Henry E. Berry, to recover damages for the alleged negligent killing of his intestate.

The only question discussed by counsel on either side, is as to appellant's right to maintain the action, he insisting that while he might have sued as parent of the decedent, under section 266, R. S. 1881, he had a right to elect between the remedy given by that section and that given by section 284, R. S. 1881. It is averred in the complaint that the deceased was eighteen years of age, and left surviving him both father and mother, but that for two months before and at the time of his death he was not in the service of his parents, or of either of them. Appellant contends that if his right to maintain the action was otherwise doubtful, these averments show an emancipation of the decedent, and that after emancipation his relation to his parents was not different from that of an adult son. It is well settled that under section 266 a parent may maintain an action for injuries re-

128	484
141	444
128	484
162	254

Berry, Adm'r, v. The Louisville, Evansville and St. Louis Railroad Co.

sulting in the death of his minor child. *Mayhew v. Burns*, 103 Ind. 328; *Louisville, etc., R. W. Co. v. Goodykoontz*, 119 Ind. 111; *Ohio, etc., R. R. Co. v. Tindall*, 13 Ind. 366; *Pittsburgh, etc., R. W. Co. v. Vining*, 27 Ind. 513.

It is also decided by these cases that the two sections, 266 and 284, are to be construed together, the former being applicable to the cases of infants, and the latter to those of adults, and infants whose parents have relinquished their right to the services of the child by emancipation, or otherwise.

It is insisted that the latter proposition, relating to infants, which it is asserted in each of these cases was not necessary to the decision of the cases, and is *obiter*, and appellee urges, with much earnestness and some plausibility, that a voluntary emancipation by a parent will not affect the question, for the reason that the parent can at any time reclaim the services of the infant. Citing *Boyd v. Byrd*, 8 Blackf. 113; *Bolton v. Miller*, 6 Ind. 262; *Clark v. Fitch*, 2 Wendell, 459; *Stovall v. Johnson*, 17 Ala. 14.

We are, however, not required to pass upon this question. The only averment in the complaint which the appellant assumes shows an emancipation, is substantially as above stated, that at the time of his death said decedent was not, and for two months theretofore had not been, in the service of his parents, or of either of them. This is not sufficient to show an emancipation.

Upon the remaining proposition the cases above cited determine the controversy adversely to the appellant. While the logic of these cases may be subject to some criticism, and the construction given by them to the two sections of the statute not altogether satisfactory, we can not feel that we would be justified in overruling them. The rule, as stated in *Ohio, etc., R. R. Co. v. Tindall*, *supra*, has been acquiesced in and followed for more than thirty years, and while it can not be said to have become a rule of property, public policy forbids that it should be overturned except for very strong

Crowder *et al.* v. The Town of Sullivan *et al.*

reasons ; and in our opinion there is here no sufficient reason to justify such action.

Judgment affirmed, with costs.

Filed June 18, 1891.

128	486
130	8
128	486
132	124
132	578

128	486
143	548
142	552

128	486
144	184
146	469

128	486
155	64
156	401
156	406

128	486
162	59

128	486
170	397

No. 14,936.

CROWDER ET AL. v. THE TOWN OF SULLIVAN ET AL.

MUNICIPAL CORPORATION.—*Payment by Yearly Instalments.—Indebtedness Not Created for Aggregate Sum.*—Where a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly instalments, since the debt for each year does not come into existence until the compensation for each year has been earned.

SAME.—*Contract for Electric Lights.—Notice.*—The statute confers upon municipal corporations authority to contract for electric lights, and does not require that notice should be given inviting proposals, nor does it require notice in any form.

SAME.—*Use of Streets.—Exclusive Privilege to One Corporation.—Can not be Granted.*—A municipal corporation can not grant to a private corporation the exclusive privilege of using its streets for the purpose of supplying the corporation, or its citizens, with light, water, fuel, or the like.

SAME.—*Use of Streets.—Special Ordinance Granting.—Validity of.—When General Ordinance Necessary.*—A special ordinance granting a permissive license to a designated corporation is effective. When a municipality attempts to regulate the mode of using its streets it must do so by a general ordinance; but when it simply grants a privilege to use the streets, and does not undertake to regulate the entire subject, a general ordinance is not indispensably necessary to authorize the licensee to use the streets. The rights acquired under a mere permissive license are subject to control under the delegated governmental power vested in the municipality.

CORPORATION.—*Existence of.—Attacked by Direct Proceeding.—When Must be.*—Where there is a statute authorizing the creation of a corporation and an attempt to comply with the statute, and an actual exercise of corporate functions, the existence of the corporation can only be destroyed by a direct proceeding.

From the Sullivan Circuit Court.

Crowder et al. v. The Town of Sullivan et al.

J. M. Humphreys, T. Wolfe, J. T. Beasley, A. B. Williams and I. H. Kalley, for appellants.

G. W. Buff, J. S. Bays and J. T. Hays, for appellees.

ELLIOTT, J.—The object of this suit is to enjoin the officers of the town of Sullivan from paying to the Sullivan Electric Light and Power Company compensation for furnishing the town and its citizens with light. The theory upon which the complaint is constructed is that the contract with the company and the ordinance upon which it is founded are void.

One of the grounds upon which the validity of the contract is assailed is that it creates an indebtedness beyond the limits prescribed by the statute. The law is against the appellants upon this point. They assume that the contract creates a debt for the aggregate of all the yearly payments provided for by the contract, and, if this assumption is not valid, their position is untenable. That this assumption is not valid is clear. Where a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly instalments, since the debt for each year does not come into existence until the compensation for each year has been earned. It may be true that the contract creates an obligation for a breach of which an action for damages will lie, but it does not create a right of action for the unearned compensation. The earning of each year's compensation is essential to the existence of a debt. If municipal corporations can not contract for a long period of time for such things as light or water, the result would be disastrous, for it is matter of common knowledge that it requires a large outlay of money to provide machinery and appliances for supplying towns and cities with light and water, and that no one will incur the necessary expense for such machinery and

Crowder et al. v. The Town of Sullivan et al.

appliances if only short periods are allowed to be provided for by contract. The courts can not presume that the Legislature meant to so cripple the municipalities of the State as to prevent them from securing light upon reasonable terms, and in the ordinary mode in which such a thing as electric light or gas is obtained. But it is unnecessary to discuss this point at greater length, for we regard the law upon it as settled by the adjudged cases. *City of Valparaiso v. Gardner*, 97 Ind. 1, and authorities cited; *City of New Albany v. McCulloch*, 127 Ind. 500; *City of East St. Louis v. East St. Louis, etc., Co.*, 98 Ill. 415; *Appeal of City of Erie*, 91 Pa. St. 398; *Grant v. City of Davenport*, 36 Iowa, 396; 1 *Dillon Munic. Corp.* (4th ed.), section 135.

The statute confers upon municipal corporations authority to contract for electric lights, and does not require that notice should be given inviting proposals, nor does it require notice in any form. *Elliott's Supp.*, section 794. As the mode of making contracts is committed to the discretion of the municipal authorities, and they are not required to give notice, a contract may be awarded without giving notice. *City of Aurora v. Fox*, 78 Ind. 1. If the municipality were endeavoring to levy a specific assessment upon individuals or upon private property, then notice would be required upon general principles; but there is no such attempt here, for the entire compensation is to be paid from the corporate treasury. There is a clear and important difference between cases where a debt is created payable out of general corporate revenues and cases where special assessments are laid upon property. See authorities cited, note 1, *Elliott Roads and Streets*, 343.

The right of the electric company to exercise corporate functions can not be collaterally attacked. Where there is a statute authorizing the creation of a corporation, an attempt to comply with the statute, and an actual exercise of corporate functions, the existence of the corporation can only

Crowder *et al.* v. The Town of Sullivan *et al.*

be destroyed by a direct proceeding. *Baker v. Neff*, 73 Ind. 68; *Williamson v. Kokomo, etc., Ass'n*, 89 Ind. 389.

It is unquestionably true that a municipal corporation can not grant to a private corporation the exclusive privilege of using its streets for the purpose of supplying the corporation or its citizens with light, water, fuel, or the like. *Indianapolis, etc., R. R. Co. v. Citizens', etc., R. R. Co.*, 127 Ind. 369; *Citizens', etc., Co. v. Town of Elwood*, 114 Ind. 332; see authorities cited, note 2, Elliott Roads and Streets, 332. If the ordinance before us is to be construed as granting an exclusive privilege it must be adjudged void in so far, at least, as it attempts to make such a grant. We are, however, quite well satisfied that the ordinance does not attempt to grant an exclusive privilege. It does, it is true, grant a right to use the streets of the town, but it does not exclude their use by competing companies. It does not throttle competition, for it merely grants a license to use the streets. It can not be held that permission to one company to use the streets excludes others; on the contrary, the grant of such a license leaves plenary power in the municipality to grant licenses to rival companies at any time. A licensee who obtains a right to use public streets does not obtain a monopoly. The right to grant other licenses remains open and unobstructed. Not only does the right to license other companies remain open, but the right to prescribe reasonable police regulations by a general ordinance also remains unimpaired. This is the effect of the decision in *Citizens', etc., Co. v. Town of Elwood*, *supra*.

A private corporation that obtains a license to use the streets of a municipality takes it subject to the power of the municipality to enact a general ordinance; for a governmental power, such as that exercised in enacting police regulations, can not be surrendered or bartered away even by express contract. But there is here no attempt to surrender or barter away this governmental power, for there is nothing more than a license to use the streets of the town. The decision

Crowder *et al.* v. The Town of Sullivan *et al.*

in the case of *Citizens', etc., Co. v. Town of Elwood, supra*, was made upon an ordinance assuming to make a discrimination in favor of one company, and thus exclude all others from using the streets of the town for supplying the citizens with fuel, and it can not be regarded as denying the right to grant a license to a designated company, although it does deny the power to discriminate in favor of one company to the detriment of competing companies. Where a municipality attempts to regulate the mode of using its streets it must do so by a general ordinance, but it does not follow that a general ordinance is essential to the validity of a license granted to a designated company. It is one thing to specifically license a corporation to lay pipes in a street or construct electric lines, and quite another to regulate the entire subject of supplying light, fuel, or the like, for where the municipal authorities assume to legislate upon the entire subject a general ordinance is required; but where they simply grant a privilege to use the streets, and do not undertake to regulate the entire subject, a general ordinance is not indispensably necessary to authorize the licensee to use the streets. But neither by a general ordinance nor by special license can discriminations be made or monopolistic privileges be created. It is, however, often true that a privilege is in its nature monopolistic, and, as shown in the case of *Indianapolis, etc., Co. v. Citizens', etc., Co., supra*, when this is so, the grant of the privilege is of necessity the grant of monopolistic rights; but in such a case the corporate grant does not create the monopoly. See authorities cited notes 1, 2 and 3, *Elliott Roads and Streets*, 567.

In this instance there is nothing more than the grant of a license; there is no attempt to create exclusive privileges, nor any attempt to regulate the entire subject. The rights acquired under a mere permissive license are subject to control under the delegated governmental power vested in the municipality, for no licensee can acquire rights not subject to regulation under the police power delegated to the local gov-

Hughes, Administrator, v. Willson.

ernmental instrumentalities. We have here no question of contract rights, for the question presented by the record is whether a special ordinance granting a permissive license to a designated corporation is effective.

Judgment affirmed.

Filed June 13, 1891.

No. 14,599.

HUGHES, ADMINISTRATOR, v. WILLSON.

ATTORNEY AND CLIENT.—*Profit Made by Attorney.—Must Account to Client.*

—Where an attorney was employed to enforce and collect a judgment and decree against specific lands, and proceeded so far in his employment as to procure a sale of the land, and had his client, under his advice, purchase it for the benefit of the estate represented by him, and thereafter, while he was yet such attorney, he purchased an outstanding title, under an express agreement that he would hold it in trust for the estate represented by his client, and subsequently sold the land at a great advance, he must be held as a trustee for his client. He must account for all the profits made in the transaction after deducting the amount he was to pay for the title and his reasonable attorney's fees.

From the Ripley Circuit Court.

J. G. Berkshire and *J. B. Rebuck*, for appellant.

J. D. Miller and *F. E. Gavin*, for appellee.

COFFEY, J.—The facts in this case as alleged in the complaint are, substantially, as follows:

On the 7th day of December, 1865, Alexander Jenkins executed to Eli Murdock a mortgage upon the land therein described to secure the payment of a promissory note for the sum of \$3,500, upon which note Murdock took a judgment in the Ripley Circuit Court on the 10th day of December, 1868, together with a decree of foreclosure. Eli Murdock died intestate, on the 10th day of February, 1869,

Hughes, Administrator, v. Willson.

leaving as his only heirs at law Jane Murdock, his widow, John Murdock, Harvey Murdock, Hezekiah Murdock and Eliphalet Murdock, his sons, and Martha Cox, his daughter, all of whom were of full age. The heirs paid the debts and made a distribution of all the estate of Eli Murdock among themselves, except the above judgment and decree, without administration. The wife of the appellant having an interest in said judgment and decree, the appellant, as the representative of his wife, employed the appellee, as an attorney at law, to collect the judgment and decree. Under the advice of the appellee, the appellant took letters of administration on the estate of Eli Murdock on the 13th day of September, 1875, caused a copy of said decree to be issued, the land therein described to be sold, and, under the order of the Ripley Circuit Court, bid it in for the benefit of the estate. Prior to the purchase of the land by the appellant, namely, on the 9th day of February, 1874, William S. Rice purchased said land at tax-sale for the sum of \$492.44. Rice, having obtained a tax-deed pursuant to his purchase, employed the appellee as his attorney to bring an action to quiet his title to said land, and on the 30th day of December, 1876, the said Rice, by the appellee as his attorney, commenced suit for that purpose in the Ripley Circuit Court against the appellant and others. When served with process, the appellee advised the appellant that it was not necessary for him to appear to said action, but that he should make default, which he did. Upon a trial of the cause the tax deed was declared invalid, but Rice recovered a judgment for the sum of \$673.18 for taxes paid, and a decree foreclosing his lien. Upon a certified copy of this decree Rice purchased the land and took a deed therefor.

On the 22d day of April, 1879, Rice conveyed said land to the appellee by a quitclaim deed, and on the 29th day of October, 1879, the appellee sold and conveyed the land to John Peterman. At the time the appellee took a conveyance of the land he did so under an agreement between him

Hughes, Administrator, v. Willson.

and the appellant, that he was to account to the appellant for the proceeds of said land, less the amount paid by him to Rice and his reasonable attorney's fees against the estate of Eli Murdock.

The appellee paid Rice \$600 for the land, and the title conveyed to Peterman was worth \$6,000. At the time the appellee took the conveyance from Rice he was the attorney of the appellant, as the administrator of Eli Murdock's estate, employed to collect the money due on the decree of foreclosure against the land conveyed by Rice to him.

This action was brought by the appellant against the appellee to compel the latter to account for the difference between the amount due for money paid to Rice and attorney's fees due from the estate of Eli Murdock, and the value of the land conveyed by the appellee to Peterman.

To a complaint setting out the foregoing facts the court sustained a demurrer. The assignment of error calls in question the correctness of this ruling.

An attorney in all transactions with his client is regarded as acting in a fiduciary capacity. *McCormick v. Malin*, 5 Blackf. 509; *Heffren v. Jaynes*, 39 Ind. 463.

A purchase of a bankrupt's estate by the solicitor of a commission was set aside, though he paid the full value for it at public auction; Lord Eldon declaring that he would set aside all purchases made by persons having a confidential character, however honest the circumstances. A devise of property to an attorney, on pretence that he would use it for another, though he intended to appropriate it to his own use, was held to be a gross breach of confidence, and was set aside. *Hooker v. Axford*, 33 Mich. 453.

A purchase by the attorney of property sold under a judgment obtained by him, for a price less than its amount, constitutes the attorney an implied trustee for his client. *Barratt v. Bamber*, 9 Phila. 202.

Where the relation of client and attorney existed, and the attorney, at the instance of his client, purchased a note se-

Hughes, Administrator, v. Willson.

cured by mortgage on the client's land, at a considerable discount, it was held that the client was entitled to the benefit of the discount, although the attorney bought the note for himself. *McDowell v. Milroy*, 69 Ill. 498.

It is a well-known rule that the attorney shall not, in any way whatever, in respect of any professional transaction between him and his client, make gain or profit for himself at the expense of his client, beyond the amount of his just and fair professional compensation. He must account to his client for all profits. He can not, as a general rule, act adversely to his client's interest, nor use the knowledge acquired confidentially in trafficking with his client's interests. *Tyrrell v. Bank of London*, 10 H. L. Cas. 26; *Manhattan Cloak, etc., Co. v. Dodge*, 120 Ind. 1; *Weeks Attorneys at Law*, section 271.

A purchase of the property involved in a suit by the attorney pending the litigation is void. *Scobey v. Ross*, 13 Ind. 117; *West v. Raymond*, 21 Ind. 305. See, also, *Lashley v. Cassell*, 23 Ind. 600.

The same principle which prohibits trustees and public officers from purchasing property of which they have the management, at a sale made or controlled by themselves, forbids an attorney who manages a suit and has the right to control a sale made by a commissioner, from becoming a purchaser. Especially is such purchase invalid when it results in a sacrifice of the property to the prejudice of the client, and to the benefit of the attorney. *Weeks Attorneys at Law*, section 273.

In this case the appellee was employed, as an attorney, to enforce and collect a judgment and decree against specific lands. He proceeded so far in his employment as to procure a sale of the land, and had the appellant, under his advice, purchase it for the benefit of the estate represented by him.

The appellee subsequently purchased an outstanding title, while he was yet such attorney, under an express agreement

Florer, Treasurer, v. Sherwood, Administrator.

that he would hold it in trust for the estate represented by the appellant. We think he should be held as a trustee for his client. To hold otherwise would be in conflict with all the authorities upon the subject. He should account to his client for all the profits made in the transaction, that is to say, after deducting the amount paid to Rice, and his reasonable attorney's fees, due from the estate of Eli Murdock, he should pay over to the appellee, as the administrator of Murdock's estate, the remainder of the purchase-price received from Peterman.

It is claimed by the appellee that at the time he received the conveyance from Rice the relation of client and attorney between him and the appellant had ceased to exist. The allegations of the complaint are otherwise, and the demurrer admits these allegations to be true. In this condition of the record we are not at liberty to say that the confidential relation of client and attorney had ceased to exist.

In our opinion the court erred in sustaining the demurrer of the appellee to the appellant's complaint.

Judgment reversed with directions to the circuit court to overrule the demurrer to the complaint.

BERKSHIRE, J., took no part in the decision of this cause.

Filed Dec. 20, 1890; petition for a rehearing overruled June 13, 1891.

No. 15983.

FLORER, TREASURER, v. SHERWOOD, ADMINISTRATOR.

TAXES.—*County Auditor.*—*Assessment of Omitted Property.*—The auditor has no power to increase the valuation of property properly listed for taxation, over the valuation placed on it by the township assessor or by the board of equalization; he can only assess property which has been omitted from the assessment lists and has not been assessed.

SAME.—*Omitted Property.*—*Identification.*—To justify such assessment by

128	495
137	33
138	442
138	451
128	495
141	384
128	495
164	549
164	628

Florer, Treasurer, v. Sherwood, Administrator.

the auditor there must be specific omitted property which is susceptible of identification.

SAME.—Insufficient Description.—A description of the property omitted as consisting of "money on hand or on deposit, money loaned, and credits due the estate," is an insufficient identification and description upon which to base an assessment of omitted property, especially where it is admitted that the part of the property listed and assessed, and that not listed and assessed, all belonged to the same classes.

SAME.—Valuation of Listed Property.—Fraud.—While the person listing property is required to place a valuation upon it, such valuation will be regarded only as a mere statement of opinion, and fraud can not be predicated on such statement.

SAME.—Void Assessment.—Decree.—Construction of.—Where an assessment made by the county auditor is adjudged void, and a decree is rendered cancelling the tax and enjoining its collection, and directing the auditor to strike out and obliterate from the tax duplicate the tax assessed, the words "strike out" and "obliterate," will be construed as requiring the auditor to make such a memorandum on the tax duplicate as will show a cancellation.

From the Tippecanoe Circuit Court.

R. P. Davidson, J. C. Davidson and C. E. Lake, for appellant.

J. B. Sherwood and J. H. Adams, for appellee.

MCBRIDE, J.—This was a suit by the appellee, as administrator *de bonis non* with the will annexed of the estate of Solomon Romig, deceased, against the appellant as treasurer of Tippecanoe county, to enjoin the collection of certain taxes assessed against the estate represented by him.

The complaint alleged, in substance, that in each of the years from 1881 to 1889, inclusive, he, as such administrator, and his predecessor, one Earhart, as the executor of said estate, had, as required by law, duly listed for taxation all of the taxable property belonging to said estate, and had each year paid all taxes assessed thereon, but that, under the claim that a portion of the personal property belonging to the estate had been omitted and not listed for taxation, the auditor of the county had assumed the right to, and had, placed a large additional amount of personal property upon the tax dupli-

Florer, Treasurer, v. Sherwood, Administrator.

cate, upon which he had assessed taxes which he had extended upon the tax duplicate, and had added penalties thereto, the additional taxes and penalties amounting in the aggregate to \$559.69.

It was further averred that there had been in fact no omission of any property, but that the assessor, having placed a valuation upon all of the property belonging to the estate, the auditor placed a higher valuation thereon, and that the assessment by the auditor was only upon a higher valuation of the same property already assessed, and upon which the taxes had been paid.

It is conceded that the complaint is good.

The appellant filed an answer in two paragraphs, each of which the circuit court held bad on demurrer.

The sufficiency of these answers presents the principal question in the case.

The first paragraph of answer gives what is alleged to be the actual value of the taxable personal property belonging to said estate in each of the years in question, and alleges the omission by the executor and administrator in each year to list a portion thereof, giving the aggregate value of such omitted property in each year.

It is alleged that the listing of such property in each of said years was partial only, that the omissions each year were purposely made, with the intent of withholding the omitted property from taxation, that neither the executor nor administrator gave any information to the assessor of the existence of any of the omitted property, and that the assessor, relying upon the lists furnished, and believing them full and accurate, acted accordingly.

It is then averred that "Said property so listed for taxation, and said property not so listed as above charged, consisted of moneys on hand or on deposit within or without the State of Indiana, subject to the order, check or draft of said Earhart for the years 1881 and 1882, and for the re-

Florer, Treasurer, v. Sherwood, Administrator.

maining years above charged, subject to the order, check or draft of said Sherman as such trustees; also, of moneys belonging to said estate loaned out, either on time or on call, and credits due said estate, but defendant is unable to give a more particular description of the said property, or of any part thereof, nor can he better describe the part so listed for taxation, or the part not so listed; but that at each of said times said property was so listed, the person listing the same well knew that such property was of the total value above charged on the first day of April in each of said years."

It is well settled that the auditor has no power to increase the valuation of property properly listed for taxation, over the valuation placed on it by the township assessor or by the board of equalization. *Williams v. Segur*, 106 Ind. 368; *Board, etc., v. Senn*, 117 Ind. 410.

He has power, however, to assess property which has been omitted from the assessment lists and has not been assessed. Section 6416, R. S. 1881 (Acts 1889, p. 341; Elliott's Supp., section 2129).

To justify such action by him there must be specific omitted property which is susceptible of identification and description.

The answer alleges that the assessment was made on omitted property, and yet the only description that can be given of the property is that it consists of money on hand or on deposit, money loaned, and credits due the estate.

It is impossible, it is averred, to more particularly describe it. This is not a sufficient identification and description upon which to base an assessment of omitted property, in a case where it is expressly admitted, as it is in this answer, that a part of the property belonging to the party has been listed and assessed, and that the property which was listed and assessed, as well as that which it is claimed was not listed and assessed, all belonged to precisely the same classes, and is all described in the answer by the same words. Indeed, we doubt if it would be sufficient in any case to justify

Florer, Treasurer, v. Sherwood, Administrator.

an auditor in listing and assessing omitted property to allege in general terms that there had been an omission of money on hand or on deposit, and of money loaned and of credits due the party. So far as money alone is concerned a dollar should, of course, be valued as a dollar, and is sufficiently described and valued when the amount is stated. But money loaned, and credits due, may or may not be of their face value, depending upon many contingencies, and to justify an assessment by the auditor upon property of that character he must know of specific loans and of specific credits which have been omitted, and upon which valuations may be placed. The facts stated in this paragraph of answer are not sufficient to constitute a defence, and the demurrer thereto was correctly sustained.

The second paragraph of the answer alleges that the administrator, in each of said years, while pretending to list all of the property belonging to the estate for taxation, "purposely fixed a valuation on said property for each of said years which he well knew was far below its real value." The undervaluation for each of said years is then given, and it is alleged that "at the time when said Sherman listed said property for taxation in each of said years he failed to inform the assessors who assessed him of the face value or condition of said estate, and never at any time informed said assessor of said undervaluations or any one of them, nor did he at any time ever exhibit to said assessor any item or portion of such property of said estate, or give any information to him respecting the same."

Appellant insists that the undervaluation of the property listed was a fraud which deprives the appellee of the right to appeal to a court of equity for relief. It is not charged that the administrator concealed any fact from the assessor, or in any manner sought to avoid making a full disclosure of any and all facts about which the assessor was entitled to be informed.

As a general rule a statement of value is a mere statement

Florer, Treasurer, v. Sherwood, Administrator.

of opinion and not of a fact, and fraud can not be predicated on such a statement. While the person listing property is required to place a valuation upon it, such valuation can, in no event, be regarded as more than a statement of the opinion of the person making it.

The valuation upon which the assessment is based is that placed upon the property by the assessor, who, while he may be aided by the valuation of the person listing the property, may wholly disregard such valuation, and is in duty bound to do so unless his judgment confirms it. This answer does not sufficiently charge the perpetration of any fraud, nor does it show any other defence. It is clearly bad, and the demurrer to it was correctly sustained.

The court rendered a decree adjudging the assessment thus made void, cancelling the taxes, and perpetually enjoining the appellant and his successors in office from collecting, or attempting to collect, them. The decree further directed that the appellant "forthwith strike out and obliterate from the tax duplicate now in his hands, or hereafter to come into his hands, the taxes assessed against said estate for said years, as averred in said complaint, to the end that the cloud created by said wrongful assessment upon the real estate of the plaintiff, as described in the complaint, shall be fully removed."

The appellant moved to modify the judgment by striking out the part above quoted. The cloud upon the title to appellee's land was removed by the decree cancelling the tax, and enjoining its collection. While striking out and obliterating from the tax duplicate the entry made thereon by the auditor could add nothing to the legal effect of that decree, yet the court might, and in such case should, require the making of such memorandum on the tax duplicate, in connection with the record of the assessment and tax, as would show such cancellation. We think that, properly construed, this is the effect and meaning of the decree. The words "strike out" and "obliterate," literally construed, would

The State, *ex rel.* Harrison, *et al.* v. Galbraith *et al.*

require an erasure, or blotting out, of the entry ; but these words were doubtless thus used inadvertently.

Judgment affirmed, with costs.

Filed June 13, 1891.

No. 15,089.

THE STATE, EX REL. HARRISON, ET AL. v. GALBRAITH ET AL.

OFFICE AND OFFICER.—*Official Bond.*—*Breach.*—No recovery can be had upon a bond executed by a public officer unless a breach of official duty is shown.

SAME.—*Superintendent of Hospital for Insane.*—*Nepotism.*—*Action on Bond.*—Section 2774, R. S. 1881, defining the duties of the superintendent of the Hospital for the Insane, does not make it his duty to demand or collect compensation from inmates of the hospital, nor forbid him from permitting persons not entitled to remain as inmates from being there maintained. By section 2776, R. S. 1881, such duty is imposed upon the trustees, and in the absence of proper by-laws, adopted by them requiring the superintendent to exclude persons not entitled to remain in the hospital, neither he nor his bondsmen can be liable for the breach of such duty.

From the Marion Superior Court.

L. T. Michener, Attorney General, and *J. H. Gillett*, for appellant.

W. W. Herod and *W. P. Herod*, for appellees.

ELLIOTT, J.—The appellee Galbraith, as principal, and the other appellees, as sureties, executed the bond upon which this action is founded. The condition of the bond is that Galbraith shall "well, truly and faithfully perform all of the duties pertaining to and required of the superintendent of the Hospital for the Insane, as required by the acts of the General Assembly of the State of Indiana, of the date of March 6th, 1879, and of all acts subsequently passed or which may be hereafter passed." The breach alleged is that Sup-

The State, ex rel. Harrison, et al. v. Galbraith et al.

erintendent Galbraith kept in the hospital a person who was not his wife or child, or the wife or child of any employee, nor an employee of the hospital, without requiring such person to pay any compensation, or promising to pay any compensation, for her maintenance.

It is a familiar rule that no recovery can be had upon a bond executed by a public officer unless a breach of official duty is affirmatively shown. It is, therefore, essential to a recovery in this case that the facts pleaded constitute a breach of duty enjoined upon the principal in the bond.

Section 2774 of the statute provides for the appointment of a superintendent of the Hospital for the Insane, and in very general words outlines his duties, but it does not make it his duty to demand or collect compensation from inmates of the hospital, nor does it forbid him from permitting persons not entitled to remain as inmates from being there maintained. In prescribing the duties of the trustees the statute declares that "they shall not allow any of the relatives or members of the family, except the wife and children of such officers whose regular home has been and is with him, of any superintendent or other subordinate or employee to be kept, maintained, or supported in the institution, without charging to such persons the full value of such maintenance and support, unless such relative or member of the family be regularly employed and paid as one of the subordinates or employees thereof." Section 2776, R. S. 1881.

It appears from the provisions quoted that the wrong alleged to constitute a breach of the superintendent's bond was, in fact, the wrong of the trustees, and it is very clear that the sureties of the superintendent can not be held responsible for the wrongful acts of the trustees. If the superintendent did not violate some duty imposed upon him by law, neither he nor his sureties can be liable upon his official bond.

We do not doubt that the trustees have power to adopt by-laws requiring the superintendent to exclude persons not en-

Merrill v. Shirk *et al.*

titled to remain in the hospital, but until such by-laws are adopted the statutory duty of excluding such persons rests upon the trustees. It is, indeed, not only within the power of the trustees to adopt the needful by-laws, but it is their duty to do so. If the proper by-laws were adopted, and the bond of the superintendent properly conditioned, that officer and his sureties might be made to answer for such a wrong as that charged, but however this may be, it is entirely clear that there can be no recovery upon the facts stated in the complaint before us.

Judgment affirmed.

Filed June 18, 1891.

No. 15,068.

MERRILL v. SHIRK ET AL.

COSTS.—*Retaxing of.*—*When Motion May be Made.*—*Bill of Exceptions.*—A motion to modify the judgment and retax the costs in a case may be made at any time during the term when the judgment was rendered, as during that entire term the proceedings are *in fieri*. It is not necessary that the motion should be extended on the order-book. It is sufficient if it is brought into the record by the bill of exceptions.

SAME.—*Bill of Exceptions.*—*What it Must Contain.*—The law does not necessarily contemplate a trial and the introduction of evidence on the hearing of a motion of this character. A bill of exceptions is sufficient which contains the verified motion to modify the judgment and retax the costs, together with an itemized and a properly certified statement of the costs, and which recites that "all the evidence introduced upon said hearing or heard by the court was the complaint, answer and reply, the verdict of the jury and the judgment of the court in said cause, together with the verified motion and exhibit above referred to."

SAME.—*Action to Quiet Title.*—*Joinder of with Action for Partition.*—*Taxation of Costs.*—*Discretion of Court.*—Where an action to quiet title is joined with an action for partition, the taxation of costs is governed by section 590, R. S. 1881, and the successful party is entitled to recover his costs, and the court has no discretion to refuse it. The verdict and judgment are conclusive against the unsuccessful party.

128	508
182	102
128	503
154	424

Merrill v. Shirk *et al.*

From the Marshall Circuit Court.

C. Kellison, for appellant.

J. D. McLaren and *E. C. Martindale*, for appellees.

MCBRIDE, J.—This was a suit by the appellant against the appellees to recover the undivided one-third of certain land in Marshall county, to quiet her title thereto, and for partition. There was a trial by jury, resulting in a verdict in appellant's favor, and a judgment quieting her title and awarding her partition as prayed.

The only question presented to us in this appeal is on the action of the trial court in refusing to modify the judgment rendered for costs, and this question, the appellee contends, is not properly in the record, and can not be considered by us. In this appellee is mistaken. The cause was commenced March 3d, 1888, and was tried and the verdict returned at the May term, 1888, of the Marshall Circuit Court. Appellees moved for a new trial, and on the 29th day of October, 1888, their motion was overruled and judgment was rendered on the verdict. Commissioners appointed by the court to make partition, made their report December 18th, 1888, the second day of the December term, 1888. Their report was approved and confirmed, and the court made an order taxing the costs in the case, one-third to the appellant and two-thirds to the appellees. The record does not show that any objection was made, or exception taken at the time to this order, but does show that on a later day of the same term appellant filed his motion to modify the judgment and retax the costs. The record further shows that this motion was not ruled upon by the court until the next term, when it was overruled, and that appellant at the time excepted. It is further shown that afterwards, and during the same term, an appeal was prayed to this court, which was granted, and sixty days' time given within which to file a bill of exceptions. This order was made April 19th, 1889, and the bill of exceptions was filed May 22d, 1889.

Merrill v. Shirk *et al.*

The motion to modify the judgment and retax the costs, made any time during the term when the judgment was rendered, was in time, as during that entire term the proceedings were *in fieri*.

All of the foregoing facts are shown by order-book entries. The motion to modify the judgment and to retax the costs is not extended on the order-book, but is brought into the record by the bill of exceptions. This is sufficient.

It is also insisted by the appellee that the question is not properly before us, because the bill of exceptions does not purport to contain all the evidence upon which the court acted in ruling upon the motion, and does not contain the technical averment that this was all the evidence given in the cause. This was not necessary. The law does not necessarily contemplate a trial and the introduction of evidence on the hearing of a motion of this character. As above stated, the bill of exceptions contains the motion to modify the judgment and retax the costs. It is verified, and shows that the total costs accrued in the case were \$162.60, and that of this sum \$120.20 was made on the trial of the issue of title, and the balance only was made in the partition proceeding proper. It is based upon and accompanied by an itemized statement of all the costs taxed in the case, certified to by the clerk.

The bill of exceptions further recites that "all the evidence introduced upon said hearing or heard by the court was the complaint, answer and reply, the verdict of the jury and the judgment of the court in said cause, together with the verified motion and exhibit above referred to." This is sufficient to bring the question before this court, and to authorize a review of the action of the circuit court.

Appellee also insists that the apportionment of the costs is left by the statute solely to the discretion of the trial court, and that unless it is shown that there was an abuse of that discretion this court can not interfere.

Section 1208, R. S. 1881, is as follows: "All costs and

Merrill v. Shirk *et al.*

necessary expenses shall be awarded and enforced in favor of those entitled thereto, against the the partitioners, in such proportion against each as the court may determine." This refers only to such costs and expenses as are incident to the partition proceeding proper; but when there is litigation beyond the ordinary question of partitioning the land, the costs made thereby should be taxed to the losing party. Works Practice, section 1464.

Section 590, R. S. 1881, provides that "In all civil actions, the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law."

Special provision is made, as we have seen, for the taxation of costs in partition proceedings, but the joinder of an action to quiet title to land with an action for partition is expressly authorized by section 278, R. S. 1881, and as no special provision is made by law for the taxation of costs in actions to quiet title to land, the taxation of costs in such actions is governed by section 590, *supra*, and the successful party is entitled to recover his costs. In this case the record discloses the fact that there was litigation over the title to the land in which partition was sought.

There was a jury trial, lasting three days, and the appellant was successful. She was therefore entitled to recover the costs made in the trial of that issue, and the court had no discretion to refuse it.

In such case the verdict and judgment are conclusive against the unsuccessful party. *Williams v. Williams*, 81 Ind. 113. It must be borne in mind that the error complained of is not that there was error in the *taxation* of costs, but that the court erred in refusing to modify the judgment and award to the successful party a judgment for costs.

The court erred in overruling the motion, and for this error the cause, in so far as the ruling on said motion and judgment for costs is concerned, is reversed, and the circuit court is directed to sustain the motion, modify the judgment, di-

 Bowen et al. v. Stewart, Administrator.

rect the clerk to tax the costs made on the trial of the question of title to the appellee, and render judgment accordingly.

Filed June 18, 1891.

No. 15,688.

BOWEN ET AL. v. STEWART, ADMINISTRATOR.

128 507
152 193

DECEDENTS' ESTATES.—Application to Remove Administrator.—Change of Venue.—In an application to remove an administrator the party making the application is not entitled to a change of venue from the county, nor is he entitled to a change from the judge.

128 507
160 90

SAME.—Appointment of Administrator.—Power of Court.—Adverse Party.—

Where more than twenty days had elapsed after the death of a decedent, and neither the widow nor any of the children had taken out letters of administration, it was proper for the court to appoint the treasurer of Carroll county, the decedent being a resident of said county at the time of his death, administrator of the estate of said decedent, it being claimed that at the time of his death the decedent held mortgages on large bodies of land in Carroll county and in adjoining counties which were unpaid, and that he was indebted to the city of Delphi and the county of Carroll in a large sum for taxes due on personal property which had never been listed for taxation. The treasurer of the county, under the circumstances, was not a stranger to the estate, and therefore incompetent to take out letters. Neither did he have such an adverse interest as against the estate as to render him an improper person to administer upon the same.

SAME.—Evidence.—Competency of to Prove Need of Administration.—Upon the hearing of the application to remove the administrator, it was proper for him to show that there were unsatisfied mortgages upon real estate in Carroll county, held by the decedent in his lifetime. It was a circumstantial fact, which the court might consider in determining as to the necessity for an administration of the estate.

SAME.—Evidence.—Communication of Decedent.—Inadmissibility of.—Custom as to Appointment of Administrators.—Incompetent to Show.—Upon such a hearing the court did not err in excluding testimony as to the wish of the decedent, communicated to his son, that his estate should not be administered upon. Neither did it err in excluding testimony as to the custom of the Carroll Circuit Court in the appointment of administrators.

Bowen *et al.* v. Stewart, Administrator.

SAME.—*Settlement of Estate by Heirs without Administration.*—*When can not be Done.*—The heirs of a decedent can not by agreement among themselves to settle an estate without administration where there are creditors, deprive such creditors of the right to take letters, or to procure others to take them. Letters having once been properly granted, the person to whom such grant is made acquires the right to fully administer the estate.

SAME.—*Appointment of Administrator.*—*Presumption as to.*—*Assailing Appointment.*—*Burden of Proof.*—Where the court has granted letters of administration, the legal presumption exists that the action of the court was right, and the burden is upon those assailing the right of appointment to prove that there was no necessity for administration.

PRACTICE.—*Adjournment of Court for the Day.*—*Reconvening of on Same Day.*—*Appointment of Administrator.*—A judge during term time may adjourn court for the day and then reconvene it, and the appointment of an administrator made after the court has so reconvened will not be vitiated, on that account.

SAME.—*Complaint.*—*When Supreme Court Need not Set Out.*—Where no question was raised either in the circuit or in the Supreme Court as to the sufficiency of a complaint it is not necessary for the latter court in rendering its opinion to set out the complaint.

From the Carroll Circuit Court.

R. C. Pollard, C. R. Pollard and M. Winfield, for appellants.

L. B. Sims, J. A. Sims, M. A. Ryan, J. H. Gould and G. R. Eldridge, for appellee.

BERKSHIRE, J.—This was an application to remove an administrator. The decedent had been for many years a citizen of Carroll county, and died a citizen thereof on the 10th day of February, 1890, intestate, leaving, as his only heirs, his widow, Catherine J. Bowen, and his children, Abner T., Nathaniel, Edward, and Henrietta T. Bowen, and Mary Busey, who are the appellants.

On the 3d day of April, 1890, the appellee was appointed by the Carroll Circuit Court the administrator of the estate of said decedent, no one having taken out letters of administration upon said estate antecedent thereto.

The application to remove the appellee was not antago-

Bowen *et al.* v. Stewart, Administrator.

nized by motion, or demurrer, and hence we need not stop to inquire whether, conceding all that is alleged therein to be true, it disclosed any sufficient cause for the appellee's removal, except to state that none of the causes given in the statute for the removal of an administrator are stated. Section 382, Elliott's Supplement.

It alleges that on the day of the appointment, and before it had been made, the court had been adjourned for the day, and until 8:30 A. M. of the next day, and, upon request, the judge caused the sheriff to reconvene the court; and thereafter, and while court was thus in session, the appointment was made, the clerk being present when the appointment was made.

The judge had the undoubted right to cause the court to be opened, and thereafter to transact any business that might properly come before it.

The adjournment of the court was a mere intermission, for, in contemplation of law, court was in session during the term fixed by law, or until its final adjournment. *Stefani v. State*, 124 Ind. 3. During the term the court might control, in a proper manner, its own sittings. *Wartena v. State*, 105 Ind. 445.

The appellee filed an answer to which a demurrer was filed and overruled, and the appellants reserved an exception.

The appellants moved the court for a change of venue from the county, which was overruled, and they reserved an exception; they then filed a motion for a change from the judge, and this motion being overruled they saved an exception. The cause was thereafter submitted to the court for trial, and after hearing the evidence a finding was returned for the appellee, and over a motion for a new trial judgment was rendered refusing to remove the appellee, as the administrator of his said trust.

The answer is very lengthy and we will not undertake to give even the substance of the averments contained therein.

It is sufficient to state that the facts therein averred dis-

Bowen *et al.* v. Stewart, Administrator.

close abundant reasons for the appointment of an administrator to administer upon said estate at the time the appellee was appointed. It further appears from the averments therein that neither the widow nor the children had any intention to take out letters of administration.

More than twenty days had elapsed after the death of the decedent before letters of administration were issued to the appellee, to wit, fifty-two days. Under the statute in force when the appointment was made, either the clerk of the court or the court itself might make an appointment after twenty days, and appoint any competent inhabitant of the county. Section 2227, R. S. 1881.

The appellants were not entitled to a change of venue nor to a change of judge.

A proceeding to remove an administrator is a proceeding summary in its character, to which the statute providing for changes of venue and change of judges does not apply.

Besides, the appointment and removal of an administrator, and the dealings which he has with his trust, are so exclusively under the supervision of the judge of the court wherein the estate is pending for settlement that it is evident it was never the legislative intention that this supervision might be destroyed by the filing of an affidavit for a change of venue, or for a change of judge.

If the appellants were entitled to a change of venue, or change of judge, then the appellee was so entitled; and if an administrator may apply for a change from the county, or judge, in an application for his removal, we know of no reason why he may not do so when he presents a partial, or his final settlement report. An application to remove an administrator is very much under the discretion of the court. *Wallis v. Cooper*, 123 Ind. 40; *Whitehall v. State, ex rel.*, 19 Ind. 30; *Williams v. Tobias*, 37 Ind. 345. And no one can so intelligently exercise the discretion which belongs to the court as the regular judge thereof, who is fully acquainted with the

Bowen *et al.* v. Stewart, Administrator.

condition of the estate, and the manner in which the administrator has theretofore performed his duties.

We have examined the case of *Scherer v. Ingerman*, 110 Ind. 428, cited by counsel for appellants.

In that case the administrator filed his petition to sell real estate for the payment of debts, and the litigation was between him and a remote grantee of some of the heirs, as to whether the real estate was subject to sale for the payment of debts; the litigation in that case under the issues was much nearer akin to an ordinary civil action than the proceeding under consideration, and we may here remark that we are not inclined to extend the doctrine of that case.

If an administrator is entitled to a change either from the judge or county in such matters connected with the settlement of his estate as rest in the sound discretion of the court, the result must work great injury to the distributees and creditors of estates because of the delay and expense which will attend the settlement thereof. As we have said, in our judgment, no such right exists.

But it is claimed that the appellee, as treasurer of Carroll county, because of the fact that said county is insisting that it holds a large claim against said estate for unpaid taxes due to the county, has such an adverse interest as against the estate as to render him an improper person to administer upon the same.

But it appears that his term as treasurer will expire before collection can be made and pass into the county treasury. But if not, it was the duty of the appellee to look after the unpaid taxes due to the county, and as no one had taken out letters of administration upon the estate, under the circumstances developed it was very proper for him to do so, as he was the representative of an alleged creditor, that was but an artificial person to whom letters of administration could not issue.

The statute does not regard a person whose financial interests may be adverse to the estate of a decedent as incom-

Bowen *et al.* v. Stewart, Administrator.

petent to administer upon the estate if otherwise a suitable person to be charged with the duties of the trust. *Wright v. Wright*, 72 Ind. 149. Upon the other hand preference is given to the largest creditor next after the next of kin. Section 2227, R. S. 1881. And ample provision is made for the protection of the estate when the adverse interest of the creditor comes in question. Elliott's Supp., section 389.

We have examined the evidence, and in our opinion it supports the finding of the court.

The court did not err in permitting the appellee to prove that there were unsatisfied mortgages of record upon real estate in Carroll county, held by the decedent in his lifetime; it was a circumstantial fact which the court might consider in determining as to the necessity for an administration of the estate.

The wish of the decedent, communicated to his son, that his estate should not be administered upon, was a mere hearsay statement, and could have no controlling influence with the court in the exercise of its discretion as to whether or not the appellee should be removed from his trust, hence, there was no error in excluding testimony as to such expressed desire.

It is hardly necessary to say that the testimony offered as to the custom of the Carroll Circuit Court in the appointment of administrators was wholly immaterial and impertinent.

We find no error in the record.

Judgment affirmed, with costs.

Filed Jan. 9, 1891.

ON PETITION FOR A REHEARING.

COFFEY, J.—An earnest petition for a rehearing has been filed in this cause, in which it is insisted that the opinion heretofore handed down does not dispose of all the questions presented by the record. It is insisted that the court should

Bowen *et al.* v. Stewart, Administrator.

have set out the complaint and answer, and should have discussed and decided the questions arising thereon.

The complaint consists of four paragraphs, is quite voluminous, and as no question as to its sufficiency was presented to the circuit court, nor its sufficiency questioned here, no good purpose would be subserved by setting it out. Indeed, to do so would uselessly encumber the opinion in the cause. Counsel are in error in their assumption that it is the constitutional duty of this court to make a statement of the questions presented by the several paragraphs of the complaint and render a decision thereon. The duties of this court in matters of this kind has long been settled by adjudicated cases. *Buskirk Prac.*, p. 11; *Willets v. Ridgway*, 9 Ind. 367; *Judah v. Trustees, etc.*, 23 Ind. 272.

In the latter case cited numerous reasons were assigned for a new trial, but the court refused to set them out in detail, and said: "The question in the record is, Did the court below err in refusing a new trial? We have decided that question and have, we think, therefore, done all that we are required to do. The reasons relied upon for a new trial, we regard not as questions in the record, but arguments upon the question, to be considered so far as may be necessary to decide the question."

It is earnestly insisted by the appellants that the question as to whether the heirs to an estate, being of full age, may or may not settle such estate without formal administration without interference from strangers, is fairly presented by the record in the cause, and should have been decided.

As to whether this question is presented by the record depends upon whether Stewart, the appellee, is to be regarded as a stranger. Assuming, without deciding, that the record presents this question, we proceed to its consideration. It is claimed that the question arises on demurrer to the answer. So much of the several paragraphs of the complaint as is necessary to an understanding of the question now to be

Bowen et al. v. Stewart, Administrator.

considered, alleges that Abner H. Bowen died, intestate, on the 10th day of February, 1890, leaving the appellants, who are all of full age and competent to contract, as his only heirs at law; that he left no debts except a few small claims due to merchants, and a small amount due to attorneys as fees; that after his death the appellants agreed to settle the estate and pay the debts without administration; that while they were thus settling said estate the appellee, who is neither a creditor nor a relative, but a stranger to the estate, on the 23d day of April, 1890, took letters of administration on said estate without the knowledge of the appellants; that there was no necessity for administration upon said estate; that the appointment of the appellee was not made at the request of any one legally interested in said estate.

Omitting to demur to the several paragraphs of the complaint the appellee answered, among other things, that he was the county treasurer of Carroll county, the county in which Abner H. Bowen resided at the time of his death, and in which he left an estate to be administered; that at the time of his death said Abner H. was indebted in a large sum, part of which the appellants had refused to pay; that he held mortgages on fifty thousand acres of land in Carroll and adjoining counties, which mortgages were unpaid; that he was indebted to the city of Delphi in the sum of \$20,000 for taxes due on personal property which he had failed to list, and that he was indebted to the county of Carroll in the sum of \$40,000 for taxes due on personal property which had never been listed for taxation.

Assuming, without deciding, that the petition upon which the appellee was appointed was defective in not stating that the appellee had an interest in the administration of the estate of Bowen, or the ground upon which he sought to take letters, still his appointment was not void. Where a petition, or notice, is necessary to call into exercise the jurisdiction of a court, or other tribunal, if some petition is filed, or notice given, however defective, if the court adjudges it

Bowen *et al.* v. Stewart, Administrator.

sufficient, and acts upon it, the subsequent action of the court, based upon such petition, or notice, is not void. *Pickering v. State, etc.*, 106 Ind. 228; *McCormick v. Webster*, 89 Ind. 105; *Stout v. Woods*, 79 Ind. 108; *State v. Wenzel*, 77 Ind. 428; *Barber, etc., Co. v. Edgerton*, 125 Ind. 455, and authorities cited.

It can not well be doubted that the heirs to an estate, who are of full age and capable of contracting, may settle such estate without regular administration, free from the interference of third parties, provided the estate owes no debts, and there is nothing to be done by an administrator except to divide such estate among the several heirs. So, they may settle such estate without administration where there are debts, provided the creditors do not object to such settlement, and a court of equity will relieve them from the interference of third persons who procure letters of administration, without their consent, where there is no necessity for such letters. *Taylor v. Phillips*, 30 Vt. 238; *Hays v. Vickery*, 41 Ind. 583; *Owings v. Bates*, 9 Gill, 463; *Babbitt v. Powen*, 32 Vt. 437; *Henderson v. Clarke*, 27 Miss. 436; *Needham v. Gillett*, 39 Mich. 573; Woerner Am. Law of Administration, section 201; *Fretwell v. McLemore*, 52 Ala. 124; *Coldron v. Rhode*, 7 Ind. 151; *Hibbard v. Kent*, 15 N. H. 516; *Hargroves v. Thompson*, 31 Miss. 211; *Walworth v. Abel*, 52 Pa. St. 370; *Weaver v. Roth*, 105 Pa. St. 408.

Many more authorities to the same effect might be cited, but the question has been so often adjudicated, in effect, in this State that such citation would seem unnecessary.

It has been repeatedly held by this court that where there is no administrator, and the estate is not indebted, the heirs may sue for and recover the assets belonging to the estate. *Moore v. Board, etc.*, 59 Ind. 516; *Stebbins v. Goldthwait*, 31 Ind. 159; *Mitchell v. Dickson*, 53 Ind. 110; *Martin v. Reed*, 30 Ind. 218; *Bearss v. Montgomery*, 46 Ind. 544; *Williams v. Riley*, 88 Ind. 290; *Begien v. Freeman*, 75 Ind. 398; *Fer-*

Bowen et al. v. Stewart, Administrator.

guson v. Barnes, 58 Ind. 169; *Schneider v. Piessner*, 54 Ind. 524.

These cases rest principally upon the ground that where there are no debts the assets of the estate belong to the heirs, and there is no necessity for an administrator. If letters of administration should be granted to a stranger, who had no interest in the estate, in a case where there was no necessity for an administrator, no doubt the court would, upon a proper application, relieve the heirs from the effect of his unwarranted interference.

But it is not true, as contended by the appellants, nor do the authorities cited so hold, that the heirs may, by agreement among themselves to settle an estate without administration, where there are creditors, deprive such creditors of the right to take letters, or procure others to take them. So long as there are debts against the estate the heirs can not maintain an action to recover the assets. So, too, so long as there is a single creditor he has a right to demand that the estate shall be settled in the mode prescribed by the statute, and that the person handling the assets shall give bond securing the proper application of the funds that may come into his hands. Letters having once been properly granted, the person to whom such grant is made acquires the right to fully administer the estate.

In this case it is admitted by the demurrer that the estate of Abner H. Bowen is largely indebted, not only to private individuals, but to Carroll county.

It is contended, however, that, as the appellee is not a creditor, nor an heir, he is a stranger to the estate, and therefore can not take out letters. Of course Carroll county, as such, can not administer on the estate of Bowen, and if it be true that such estate owes the county forty thousand dollars, which can not be collected without administration, the county is, if the position assumed by the appellants is sustained, without remedy. But we are not inclined to sustain the position of the appellants in this case. Carroll county

Bowen et al. v. Stewart, Administrator.

can act, we think, by its officers and agents. The appellee, as the treasurer of the county, is specially charged with the duty of collecting the taxes due from those liable to assessment within its jurisdiction. If the estate of Bowen owed Carroll county the taxes named in the answer, which could not be collected without administration, we think it was the duty of the appellee, who was charged with the duty of collecting such taxes, to take letters of administration himself, or to procure some one else to do so, to the end that such taxes might be collected.

The court having granted letters to the appellee, the legal presumption existed that the action of the court was right, and the burden was upon the appellants to prove that there was no necessity for administration upon Bowen's estate.

The question as to whether the estate owed the taxes mentioned in the answer was an important question in the case. As to whether he listed all his property for taxation was, at the time of the trial, best known to the appellants, and they being in possession of his property could perhaps have shown that fact. The evidence in the cause was not, in our opinion, of a character to convince the court that there were not taxes due from Bowen's estate on property not listed for taxation.

We have again gone over the record in this cause, and feel warranted in saying that no error has intervened which would authorize a reversal of the judgment of the circuit court.

The petition for a rehearing is overruled.

Filed June 17, 1891.

Cadwallader v. The Louisville, New Albany and Chicago Railway Co.

128	518
131	263
131	497
128	518
141	100
143	412

No. 14,808.

**CADWALLADER v. THE LOUISVILLE, NEW ALBANY AND
CHICAGO RAILWAY COMPANY.**

RAILROAD.—*Accident at Crossing.*—*Contributory Negligence of Injured Party.*
—*What Constitutes.*—*When Question of Fact for Jury.*—One who approaches a railroad crossing with which he is familiar, and attempts to cross without looking and listening for approaching trains, where it is possible to do so, is guilty of such contributory negligence as precludes him from a recovery if he is injured, although the crossing was supplied with a flagman, and the flagman did not give notice of the approach of danger. A person attempting to cross should not have the right to assume, from that circumstance, that no danger existed, and enter upon the railroad track without looking. Had the flagman done anything to induce the appellant to attempt the crossing at the time she was hurt, or anything to throw her off her guard, then the question of her negligence would have been a question for the jury.

From the Montgomery Circuit Court.

J. E. Humphries, M. D. White, W. H. Thompson, G. W. Paul, J. West and W. E. Humphrey, for appellant.
E. C. Field and C. C. Matson, for appellee.

COFFEY, J.—This was a suit by the appellant against the appellee to recover damages on account of a personal injury sustained by her at a point where the appellee's road crosses one of the streets in the city of Crawfordsville. A trial of the cause by jury resulted in a general verdict for the appellant. With the general verdict the jury returned answers to special interrogatories, upon which the court rendered judgment for the appellee, notwithstanding the general verdict. The assignment of error calls in question the correctness of this ruling.

The material facts in the case, as they are disclosed by the special answers above referred to, are as follows: The appellee's railroad runs nearly north and south through the city of Crawfordsville and crosses Main street in said city, which runs east and west. At the point where the railroad

Cadwallader v. The Louisville, New Albany and Chicago Railway-Co.

crosses Main street it runs through a cut, but the street has been graded down so as to make a gradual approach to the railroad on either side. At the time the injury occurred, and for some time prior thereto, the appellee kept a watchman at this crossing. The appellant resided near the crossing, and for the period of eleven years before the injury was quite familiar therewith. On the 23d day of December, 1884, about eleven o'clock in the forenoon, the appellant approached the crossing from the business part of the city, returning to her residence, and in attempting to cross the track was struck and injured by the appellee's engine and cars, moving at the rate of about five miles an hour. As the engine and cars approached the crossing no bell was rung, nor did the watchman give any notice that a train was approaching. The ground was covered with snow upon which had fallen a heavy sleet, and the wind was high. The train which struck and injured the appellant approached the crossing from the north. Before entering upon the crossing the appellant did not look for approaching trains, but looked at the watchman stationed at the crossing. The appellant at the time of the injury was a person of ordinary intelligence, and was possessed of good hearing and good eyesight. When within twenty feet of the railroad track the appellant had an unobstructed view of the track for the distance of one hundred feet north, and when within ten feet of the track she had an unobstructed view for the distance of three hundred feet, and could have seen the approaching train before she stepped upon the track, had she looked.

Under these facts, appearing as they do from the answers to the special interrogatories, the court did not err in rendering judgment thereon for the appellee, notwithstanding the general verdict returned by the jury. They are wholly inconsistent with the general verdict, and the two can not stand together. It has been repeatedly decided by this and other courts of last resort, that one who approaches a railroad crossing with which he is familiar, and attempts to

Cadwallader v. The Louisville, New Albany and Chicago Railway Co.

cross without looking and listening for approaching trains, where it is possible to do so, is guilty of such contributory negligence as precludes him from a recovery if he is injured. Indeed the principle is so well settled, and is so firmly fixed in our jurisprudence as not to need further elaboration. *St. Louis, etc., R. W. Co. v. Mathias*, 50 Ind. 65; *Toledo, etc., R. W. Co. v. Goddard*, 25 Ind. 185; *Terre Haute, etc., R. R. Co. v. Clark*, 73 Ind. 168; *Indiana, etc., R. W. Co. v. Greene*, 106 Ind. 279; *Indiana, etc., R. W. Co. v. Hammock*, 113 Ind. 1; *Ohio, etc., R. W. Co. v. Hill*, 117 Ind. 56; *Mann v. Belt R. R., etc., Co., ante*, p. 138.

The appellant admits the force of this rule, but contends that this case is an exception, for the reason that the crossing was supplied with a flagman, and as the flagman did not give notice of the approach of danger, she had a right to presume that none existed, and to enter upon the railroad track without looking.

We do not think this case is governed by the case of *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, and similar cases, where the company is required to close a gate upon the approach of trains, and thus cut off the approach of persons desiring to cross. In such cases it is held that the open gate is an invitation to cross, and that the person approaching the crossing has a right to rely upon such invitation. But even in that class of cases persons crossing are not excused from the use of some care to avoid injury.

In the case of *Pennsylvania Co. v. Stegemeier, supra*, where the deceased entered upon the track through an open gate, it was said by this court: "He had no right, however, to recklessly omit to use his senses of sight and hearing, and rely entirely upon this presumption; but he did have a right to presume that there were no approaching trains."

Assuming in this case that the appellant had the right to presume that no train was approaching, by reason of the failure of the flagman to give notice, yet this did not excuse her from the use of her senses of sight and hearing in

Cadwallader v. The Louisville, New Albany and Chicago Railway Co.

order to ascertain the fact for herself. With the use of these senses she was as well able to ascertain whether a train was approaching as the flagman at the crossing, and a failure to use them was negligence. It has often been held by this court that negligence on the part of the railroad company does not excuse the injured party from the exercise of care on his part. *Bellefontaine R. W. Co. v. Hunter*, 33 Ind. 335; *St. Louis, etc., R. W. Co. v. Mathias, supra*; *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31; *Indiana, etc., R. W. Co. v. Greene, supra*; *Indiana, etc., R. W. Co. v. Hammock, supra*; *Ohio, etc., R. W. Co. v. Hill, supra*; *Woodard v. New York, etc., R. R. Co.*, 106 N. Y. 369.

The failure of the flagman at the crossing to notify the appellant of the fact that a train was approaching was, at most, negligence, and did not excuse her from the use of some care on her part to avoid injury.

It is not found that the flagman did anything to induce the appellant to attempt to cross the track. The most that is claimed is that he did not notify her that a train was approaching.

Had the flagman done anything to induce the appellant to attempt a crossing at the time she was hurt, or anything to throw her off her guard, then the question of her negligence would have been a question for the jury. *Chicago, etc., R. R. Co. v. Hedges*, 105 Ind. 398; *Pittsburgh, etc., R. W. Co. v. Martin*, 82 Ind. 476. But we have no such case before us. Judgment affirmed.

Filed April 2, 1891; petition for a rehearing overruled June 19, 1891.

Hedrick v. Hedrick.

No. 15,703.

HEDRICK v. HEDRICK.128 522
140 435
141 590

DIVORCE.—*Alimony.*—*Evidence.*—*Pension.*—For the purpose of determining the amount of alimony to be given, the wife may testify as to the amount of pension money the husband is receiving.

SAME.—*Alimony.*—*When Not Excessive.*—An allowance of \$1,100 as alimony is not excessive where the custody of two small children is given to the wife, the three remaining children of the family being able to care for themselves, and the husband is the owner of real estate worth two thousand dollars, in the purchase of which three hundred dollars of the wife's money was used.

SAME.—*Custody of Children.*—*Discretion of Trial Court.*—*Supreme Court.*—The Supreme Court will not disturb an order of the trial court awarding the custody of the children, unless it appears that the court has abused its discretion.

From the Brown Circuit Court.

W. C. Duncan and *S. Hedrick*, for appellant.

F. T. Hord, *M. D. Emig* and *R. L. Coffey*, for appellee.

OLDS, C. J.—The appellant and appellee were husband and wife and had, as the fruits of their marriage, five living children, the oldest twenty-three and the youngest five years of age. Appellant brought this suit for divorce, and appellee filed a cross-complaint. They charged each other with cruel treatment as the grounds of divorce in the complaint and cross-complaint.

Issues were joined by answers in denial to the complaint and cross-complaint. The cause was tried by the court, resulting in a finding in favor of the appellee, giving to her a divorce, the custody of the two youngest children, both daughters, aged respectively five and eight years, and allowing to her \$1,100 alimony.

The appellant filed a motion for a new trial, which was overruled and exceptions reserved, and then moved for a modification of the judgment which was also overruled and exceptions noted at the time.

Hedrick v. Hedrick.

The first alleged error discussed is, that the court erred in permitting the appellee to testify as a witness as to the amount of pension money the appellant was receiving from the United States on account of disabilities. It is contended that this was error for the reason that "in granting a divorce the court can only consider the financial ability of the husband at the time, as indicated by the owning of property or wealth which was the mutual earnings of the husband and wife," and that "a pension granted by the United States for disabilities acquired in the service can not be considered in any view as an element of wealth."

This testimony was not objectionable for the reasons urged by counsel.

The statute (section 1045, R. S. 1881) provides that "The court shall make such decree for alimony, in all cases contemplated by this act, as the circumstances of the case shall render just and proper," etc.

For the purpose of determining the amount of alimony to be given in a particular case, the court has the right to inquire into the circumstances of the parties and ascertain the amount of property owned by the husband at the time, the source from whence it came, the ability of the husband to pay by reason of his financial circumstances, his income, and his ability to earn money, as well as his inability to earn money on account of ill health, and upon a full investigation it is the duty of the court to make such an allowance for alimony as is just and proper.

These parties had lived together for years as husband and wife, and had born to them six children, five of whom are still living, three being minors.

The court decreed a divorce in favor of the appellee, and gave her the custody of the two youngest children. The evidence showed the appellant to be the owner of real estate of the value of two thousand to twenty-two hundred dollars, and that he owned personal property to the amount of about

Hedrick v. Hedrick.

\$400, and was indebted to the amount of the value of the personal property.

There was also evidence tending to show that the husband had used some \$300 of the wife's money in the purchase of the real estate, the title to which was in his name, and that the wife had no property.

Under these circumstances it was quite proper for the court to inquire into the physical condition of the appellant, and his facilities for making or obtaining money, and the wants and needs of the husband, the wife and minor children.

It is next contended that the judgment for alimony is excessive.

We do not think it is. The custody of the two small children was given to the wife. There was but one other minor child, and she was sixteen years of age. The father was practically relieved of the liability for the support of the children, and this duty was cast upon the wife. *Husband v. Husband*, 67 Ind. 583; *Jonas v. Jonas*, 73 Ind. 601. See, also, *Faurote v. Carr*, 108 Ind. 123; *Mercer v. Mercer*, 114 Ind. 558. The allowance for alimony is not excessive.

It is next contended that the court erred in giving to the wife the custody of the two children. We do not deem it necessary to set out or give a synopsis of the evidence bearing upon this question. This was a question to be determined by the trial court. The judge trying the case saw the parties and witnesses and heard them testify. The children, the custody of whom was given to the mother, were two small girls, needing the care and attention of a mother. It was natural and proper to give them into the custody of the mother unless she was an unfit person to have the custody of them, or it was for the best interests of the children to give the father the custody of them.

The court trying the cause must exercise a discretion in regard to making provision for the children, and this court will not disturb the order made by the trial court unless it appears that there has been an abuse of such discretion.

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

There does not appear to have been any abuse of discretion in this case in giving the mother the custody of her two infant daughters.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed Feb. 3, 1891; petition for a rehearing overruled June 19, 1891.

No. 15,640.

**THE WESTERN PAVING AND SUPPLY COMPANY v. THE
CITIZENS' STREET RAILROAD COMPANY.**

STREET RAILWAY.—Charter.—Contract.—A charter granted by the common council to a street railway company to construct and operate a street railway within the corporate limits of a city, constitutes a contract between such railway company and the city.

SAME.—Charter, How Construed.—Such charter is to be strictly construed against the railway company, and it has no doubtful rights under such charter, for where there are doubts they are construed against the grantee and in favor of the city.

SAME.—Amendatory Ordinance.—Consideration.—An ordinance of the city of Indianapolis, passed in 1864, authorizing the Citizens' Street Railway Company to use the streets of the city for the purpose of constructing and operating a street railway, provided that the company should boulder the space between rails, and pave, boulder or otherwise improve and keep in repair two feet on the outside of each rail. An amendatory ordinance, passed in 1878, provided, instead, that the company should keep the space between the rails, together with all bridges and crossings of gutters, and two feet on the outside of each rail in good repair. Both of these ordinances were accepted by the company. The amendatory ordinance was passed in consideration that the company should unite its two disconnected systems of railway, charge a fare of five cents for transportation to any part of the city, and construct within a given time certain additional lines of railway.

Held, that a compliance by the company with the conditions of the ordinance was a sufficient consideration for the amended ordinance, and

128	525
136	539
128	525
138	467
128	525
140	116
128	525
149	120
128	525
154	297
128	525
157	169
128	525
159	477
128	525
160	101
160	102
160	112
128	525
171	260

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

that when it was accepted by the company and its conditions complied with it became a binding contract.

SAME.—Repairs.—Improvements.—Where an ordinance provides that a street railway company shall keep the space between the rails and a certain space outside each rail in repair, the city can not, by a subsequent ordinance, impose on such company, without its consent, the obligation of paying a proportionate share of the cost where a street occupied by its railway is improved.

SAME.—Consideration.—Parol Evidence.—An ordinance amending a section of an ordinance which required the Citizens' Street Railway Company to pave between its tracks provided that such company should only be required to keep the space between the rails in good repair. The city by a subsequent ordinance sought to compel the company to pay a part of the cost of street improvements. This ordinance was not accepted by the company. Afterwards the city granted to the Citizens' Street Railroad Company, the purchaser of the street railway, all the rights, privileges and franchises of the Citizens' Street Railway Company in consideration that the former company should assume all the obligations and duties of the latter.

Held, that it was not competent to prove by parol that the new company, in consideration of the passage of the ordinance ratifying and approving the sale, accepted the ordinance which sought to make the old company liable for street improvements.

SAME.—Liability for Assessment.—When Property-Owner not Estopped to Deny.—A street railway company, whose property is not subject to assessment for street improvements, is not estopped to deny its liability for an assessment, because it stands by without objection until the improvement is completed, if it is one which the city has authority to make.

From the Marion Circuit Court.

A. C. Harris and L. Cox, for appellant.

H. C. Allen, F. Winter and J. B. Elam, for appellee.

COFFEY, J.—This case was under consideration by the late Judge Mitchell, prior to his death, and, while so considering it, he prepared the following statement, which we adopt :

“ On the 18th day of January, 1864, the common council of the city of Indianapolis passed an ordinance authorizing the Citizens' Street Railway Company, which had been duly organized under the general laws for the incorporation of street railways, to use the streets of the city for the purpose

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

of constructing and operating thereon a street railway. Among other things it was provided, in the ordinance, that the company should boulder that part of the street it might thereafter occupy lying between the rails of its track, and also that it should pave, boulder, or otherwise improve and keep in repair two feet on the outside of each rail, so as at all times to correspond with the street outside. Pursuant to the above ordinance the street railway system was in part constructed. Subsequently, in the month of April, 1878, the common council and board of aldermen amended so much of the ordinance of 1864 as imposed upon the company the duty of bouldering the part of the street between the rails of its track, and paving, or otherwise improving, as the street might be, a space outside the tracks on either side, and instead thereof provided that 'the said company shall keep the tracks and two feet on the outside of each rail, together with all bridges, and the crossings of all gutters, at all times, in good repair to the satisfaction of the common council.' The company was required to signify its acceptance of the amendment within thirty days, and it is averred that the ordinance, as amended, was duly accepted.

"It appears that afterwards, in April, 1884, an ordinance was duly adopted in which it was provided that when any street upon which there existed a line of railway, was improved from curb to curb, the improvement should be made under contract, as required by law, and that the street railway company should be liable to the contractor for its proportion of the total cost; the proportion to be determined by the city civil engineer according to the method prescribed in the ordinance.

"Nothing appears to indicate that the company accepted or consented to the provisions of this last ordinance.

"Subsequently, in 1888, the property and franchises of the corporation hereinbefore named, were transferred to the Citizens' Street Railroad Company, a new corporation then recently organized. The new company presented to the com-

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

mon council an ordinance known as the ordinance of April 23, 1888, which was duly adopted, and which is of the tenor following :

‘ Be it ordained by the common council and board of aldermen of the city of Indianapolis, that the sale and transfer heretofore made by the Citizens’ Street Railway Company of Indianapolis, Indiana, of all its property, rights, franchises and privileges in the city of Indianapolis to the Citizens’ Street Railroad Company of the city of Indianapolis, its successors and assigns, subject to all the duties, conditions and obligations heretofore imposed and now resting on said railway company, be, and the same is hereby ratified and approved ; and all said rights, privileges and franchises heretofore possessed by said old corporation are granted to and confirmed in said new corporation, its successors and assigns, subject to the same duties and obligations as vested in said old corporation.’

“In 1889 an ordinance was duly passed for the regrading of two squares of Pennsylvania street with asphalt. The contract was duly let to the Western Paving and Supply Company, and the work was done and accepted by the city, the amount estimated as the proportion to be paid by the company, according to the provisions of the ordinance of 1884, being \$3,716.28. The railway company denied its liability, whereupon the contractor instituted this suit to recover the amount.”

The central position which the street railway company plants itself upon is, that the ordinance passed by the common council of the city of Indianapolis in 1864, and the amendment thereto adopted in 1878, both of which were duly accepted by its predecessor, had the force and effect of a contract which could not be altered or impaired without its consent ; that the old company had never consented to nor accepted the ordinance of 1884 which sought to impose upon it more extended obligations, and that by the ordinance of April 23d, 1888, the new company became subject to the

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

same duties and obligations that had theretofore been imposed upon the old, no greater and no less, and it was not bound by the ordinance passed in 1884, by which the obligation of paying a proportionate share of the cost of street improvements was sought to be imposed upon the old company.

The vital question to be decided by this court is this: Does the amendatory ordinance of April, 1878, providing that the Citizens' Street Railway Company should keep the space between its tracks and two feet on the outside of each rail, together with all bridges and crossings of gutters at all times in good repair, to the satisfaction of the common council and board of aldermen, and to cause the space between its tracks and two feet on the outside of each rail to conform to the grade of the street on which the same is laid, amount to a contract, based upon a sufficient consideration, the legal effect of which was to release the company from the performance of duties imposed by the ordinance of 1864, to which the appellee succeeded by its purchase from that company?

Many of the questions governing the rights existing between street railway companies and the cities in which they operate their roads, under charters granted by such cities, seem to be too well settled to admit of longer controversy, while many other questions remain in doubt and uncertainty.

It is settled that a charter granted by the common council to a street railway company to construct and operate a street railway within the corporate limits of a city, constitutes a contract between such railway company and the city. *Chicago v. Sheldon*, 9 Wallace, 50; *Coast-Line Railroad Co. v. Mayor, etc.*, 30 Fed. Rep. 646; *State, ex rel., v. Corrigan, etc., Street R. W. Co.*, 85 Mo. 263; *District of Columbia v. Washington, etc., R. R. Co.*, 4 Am. and Eng. R. R. Cases, 161; *Farrar v. City of St. Louis*, 80 Mo. 379; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Greenwood v. Freight Co.*, 105 U. S. 13; *New Jersey v. Yard*, 95 U. S. 104.

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

It is also settled that such charter is to be strictly construed against the railway company, and that it has no doubtful rights under such charter, for where there are doubts they are construed against the grantee and in favor of the city. *Citizens' R. W. Co. v. Jones*, 34 Fed. Rep. 579; *Mayor, etc., v. Ohio, etc., R. R. Co.*, 26 Pa. St. 355; *Birmingham, etc., R. W. Co. v. Birmingham, etc., R. W. Co.*, 79 Ala. 465; *West Philadelphia, etc., R. W. Co. v. City of Philadelphia*, 10 Phila. 70.

It seems to be settled that a street railway company is bound to keep in repair that portion of the street used by it, even in the absence of a stipulation in its charter requiring it to do so, but the question as to whether it is compelled to improve the street, as ordered by the city, in the absence of a contract to that effect, seems to be in some doubt. It is undoubtedly true that the authorities upon this question are conflicting.

Judge Elliott, in his valuable work on Roads and Streets, after a careful examination of the authorities upon the subject, at page 594, says: "As much as can be safely affirmed in the present state of the decided cases is that the private corporation is bound to repair but is not bound to improve. It is bound to restore but is not bound to change. * * It would not, as we interpret the rule sustained by the weight of authority, be compelled to make the new pavement, but it would be its duty, in making repairs after the new pavement was laid, to make them to correspond to the new pavement."

The conclusion reached by Judge Elliott, as stated above, is fully warranted by the authorities cited in support of the text.

By section 5 of the original charter granted to the Citizens' Street Railway Company and accepted by it, that company contracted with the city of Indianapolis to boulder the streets between the rails, and to pave or otherwise improve the street for a given space outside its rails. If this section was still in force the case would, we think, be free from

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

difficulty. But if the amendment of 1878 was a valid and binding ordinance, and was accepted by the company, section 5 of the original charter does not now exist, being merged in the amended section. It is to be inferred from the amendment above referred to, that the company under the original charter had constructed, in the city, two systems of railway, one south of the union railway tracks and one north, which were wholly disconnected. The city was desirous of having these two systems connected, and of limiting the fare to be charged for the transportation of passengers to any part of the city to five cents; and, also, that the company should construct, within a given time, certain additional lines of railway named in the ordinance. It is recited in the amended ordinance that it is passed by the common council and board of aldermen in consideration that the company will comply with the desire of the city as above expressed.

A compliance by the company with the conditions expressed in the ordinance was, we think, a sufficient consideration for the amended ordinance, and when it was accepted by the company and its conditions complied with it became a binding contract. The amount of the consideration was a question to be settled by the contracting parties, and is a matter over which the courts, in the absence of fraud, have no control. This amended section 5 provides, as we have seen, that the company shall keep the space between its rails and two feet on the outside of each rail, together with all bridges at the crossing of gutters, at all times in good repair, and omits the provisions contained in the original charter that the company should boulder the space between the rails of the track, and pave or otherwise improve (as the street may be) two feet on the outside of each rail. The contract then, made between the city and the company in 1878, was a contract to repair and not a contract to improve the streets upon which the railway was then, or should thereafter be laid. The question, therefore, arises whether the

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

city of Indianapolis possessed the power to pass a binding ordinance, in the year 1884, requiring the street railway company to pay for improving the streets occupied by its street railway. The question here presented seems to have been carefully considered, not only by some of the State courts, but by the Supreme Court of the United States.

In the case of *Coast Line Railroad Co. v. Mayor, etc.*, *supra*, the question involved was similar to the one now before us.

In that case the city of Savannah had granted to the Coast Line Railroad Company the right to lay a track upon a certain street in the city on conditions prescribed in an ordinance, one of which was as follows: "In the event of paving by the city, of the whole or any part of the streets used by said railroad company, the portion of the track between the rails shall be paved and kept in good order and thorough repair by the company at its own expense and cost." The ordinance was accepted by the company. The Legislature of the State authorized the mayor and aldermen of the city to pave the streets, and by section two of the act granting such authority, it was provided that any street railroad company, having tracks running through the streets of the city, should be required to macadamize or otherwise pave, as the mayor and aldermen should direct, the width of its tracks and three feet on each side of every line of track then in use, or that might thereafter be constructed by such company. Pursuant to the statute, the city passed an ordinance to pave Broughton street, upon which the company had a track, with asphalt, and directed the company to pave, not only between its rails, but for three feet on each side of the rails, and the company refusing to pave otherwise than between its tracks, the city laid the additional pavement and levied upon the property of the company for payment of the expense. The company brought suit for an injunction, upon the ground that the act of the Legislature, under which the city acted, was in violation of the Constitution of the

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

United States, as it impaired the obligation of the contract embodied in the ordinance by which the company had been granted the right to occupy the streets. It was held by the court that the provisions of the ordinance requiring the company to pave and keep in good and thorough repair the portion of the street between the rails of its track, was the limit of the paving to be done by the company, and that the obligation to do this amount of paving was as binding on the city as it was upon the company, and that the act of the Legislature above referred to impaired the obligation of this contract, and under the provisions of section 10, article 1, of the Constitution of the United States, was void.

In the case of *State, ex rel., v. Corrigan, etc., Street R. W. Co., supra*, the ordinance which conferred upon the company the right and privilege of using the streets of the city for a horse railway contained a provision which required the railway company to keep and maintain the space between its rails and for two feet on either side of its track, and all street crossings along its line, in good repair. It was held that under such ordinance the company could not be compelled to reconstruct the street; that the obligation to repair a street is not an obligation to construct thereon a new pavement. It was further held that the city could not, by a subsequent ordinance, impose on the company, without its consent, the additional obligation to pave the street; and that a subsequent ordinance attempting to impose such additional burden could not be sustained on the ground that it was the proper exercise of the police power of the city.

In the case of *Chicago v. Sheldon, supra*, the city of Chicago, by proper ordinance, granted to the North Chicago City Railway Company a charter to construct its railway upon certain streets in the city of Chicago, which charter contained the following provision :

“The said company shall, as respects the grading, paving, macadamizing, filling, or planking of the streets, or parts of the streets, upon which they shall construct their said

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

railways, or any part of them, keep eight feet in width along the line of said railway, on all the streets wherever one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, in good repair and condition during all the time to which the privileges hereby granted to said company shall extend, in accordance with whatever order or regulation respecting the ordinary repairs thereof may be adopted by the common council of said city."

It was held by the Supreme Court of the United States, the court of last resort, upon questions of the kind we are now considering, that under this charter the company could not be held liable for improvements made on the streets occupied by its railway, and that its obligation could only be extended to the duty of repairing the streets after they had been improved by the city.

In the case of *State, ex rel., v. Corrigan, etc., Street R. W. Co., supra*, the court, in speaking of the distinction between constructing a street and keeping the same in repair, says: "The obligation to repair a street is one thing, and the obligation to construct a street is another and different thing. To repair a thing is to restore it to a sound state after decay, injury, dilapidation, or partial destruction. To reconstruct is to construct or build again. One who only assumes an obligation to repair a house could not be required to tear it down and rebuild it."

Following these authorities we are constrained to hold that the Citizens' Street Railway Company, under the amended charter of 1878, could not have been compelled to pay assessments for street improvements.

Without torturing the language used, and holding that the words "repair," "construct" and "rebuild," are synonymous, and thus putting ourselves in conflict with all the authorities upon the subject, we can not reach the conclusion that the appellee, which succeeded to the rights of the Citizens' Street Railway Company, is liable under this charter

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

to be assessed for the expense of paving or repaving the streets of the city of Indianapolis.

The conclusion here reached is not in conflict with the case of *Pennsylvania R. R. Co. v. Miller*, 132 U. S. R. 75. In that case the company obtained its charter from the State at a time when such corporations, under the Constitution of the State, were liable for property actually taken in the construction of their railways, but were not liable for consequential damages. . Subsequently the Constitution of the State was so amended as to render such corporations liable for consequential damages. It was held that the company had no such contract with the State of Pennsylvania as exempted it from the operation of this constitutional amendment; that it took its charter subject to the general laws of the State, and subject to such changes as might be made therein, and to such changes as might be made in the provisions of the Constitution.

It seems plain to us that there is a broad distinction between the principle announced in that case and the case before us, where the appellee has an express contract limiting its liability to the expense of keeping that part of the streets used by it in repair, and exempting it from the burden of improving the streets. That such a contract as the one before us is binding on the city is abundantly established by the authorities above cited.

In the second paragraph of the complaint the appellant alleged, substantially, that the ordinance of 1888, above set out, was presented to the common council and board of aldermen of the city of Indianapolis, and while the same was under consideration, in order to induce the city to accept and pass the same, and as the consideration moving from the appellee to the city therefor, the appellee then and there promised and agreed with the city that if it would pass the ordinance as presented, the appellee would accept, and did then and there accept and become bound by the ordinance of 1884 above referred to, and that in consideration of said promise,

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

acceptance and agreement the council and board of aldermen did then and there pass the ordinance, and upon no other consideration.

Substantially the same allegations are contained in the first paragraph of the complaint, except that in this paragraph it is alleged that the appellee, to induce the city to accept and pass the ordinance of 1888, represented to the city that by the terms of said ordinance it was bound to comply with the ordinance of 1884, and that the city acted upon this representation and construction, and passed the same.

These allegations, on motion of the appellee, were struck out by the court, and this ruling is assigned as error.

As we have seen, the ordinance of 1888, as well as all other ordinances granting rights to the company, constitutes a contract between the city and the company.

There is no disagreement among counsel as to the general rule that parol evidence will not be received to vary, contradict, add to or to subtract from the terms of a written contract. Nor is it controverted that the ordinance of 1888 constitutes a written contract between the city and the appellee.

The controversy relates to exceptions to the general rule, and as to whether the case before us falls within any of the exceptions.

It is, substantially, agreed that one of the exceptions to the general rule is that found in Stephens Digest of Evidence, article 90, p. 161, namely, that where the existence of any separate oral agreement is alleged, as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole transaction between them, such oral agreement may be proven.

It is affirmed by the appellant that the case before us falls within this exception, while the appellee denies it.

In the case of *Welz v. Rhodius*, 87 Ind. 1, the question

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

now under consideration was very fully considered. The doctrine as announced in that case, however, has been so far modified by later decisions of this court that it is not now, upon the subject we are considering, to be regarded as unquestioned authority. *Singer Manufacturing Co. v. Forsyth*, 108 Ind. 334; *Diven v. Johnson*, 117 Ind. 512; *Conant v. Nat'l State Bank*, 121 Ind. 323; *Carr v. Hays*, 110 Ind. 408.

In the case of *Conant v. Nat'l State Bank*, *supra*, it was said by this court: "It is true that the actual consideration of a contract may be shown by parol evidence, but it is not true that where the acts that a party agrees to perform are expressly and specifically set forth, it may be shown by parol evidence that he agreed to do other things. Where the writing states specifically the acts which the parties are to perform, no other acts can be proved by parol except in cases of fraud or mistake."

So, in the case of *Pickett v. Green*, 120 Ind. 584, it was decided that where the contract is complete upon its face a stipulation as to the consideration becomes contractual, and that where there is an express and positive promise to pay a stipulated consideration the general rule applies, and the consideration expressed can no more be varied by parol than any other part of the contract. See, also, *Reisterer v. Carpenter*, 124 Ind. 30.

These authorities must now be considered as the law in this State, and in so far as they conflict with the case of *Welz v. Rhodius*, *supra*, that case must be regarded as overruled.

The action of the circuit court in striking out the allegations above referred to, judged by these cases, was not erroneous. The city of Indianapolis, by the ordinance of 1888, granted to the appellee all the rights, privileges and franchises before that time possessed by the Citizens' Street Railway Company, and in consideration of such grant the

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

appellee assumed all the obligations and duties resting upon that company.

If the Citizens' Street Railway Company was not bound by the ordinance of 1884 it imposed no duty upon it, and to permit the appellant to allege and prove by parol that the appellee assumed the burdens imposed by that ordinance would be to permit it to prove that the appellee agreed to do something in addition to what is expressed in the contract as an additional consideration for the ordinance of 1888. As we have seen this can not be permitted.

Finally it is contended by the appellant that the appellee is estopped from denying the validity of the assessment for the collection of which this suit is prosecuted, by reason of standing by and making no objection to the improvement until the same was completed.

It has often been held by this court that where the owner of property liable to assessment for street improvements stands by and makes no objection to improvements which benefit his property, he is estopped from denying the authority by which such improvements were made, and will be held to pay assessments made in aid of the improvement. *City of Lafayette v. Fowler*, 34 Ind. 140; *Hellenkamp v. City of Lafayette*, 30 Ind. 192; *Palmer v. Stumph*, 29 Ind. 329; *Martindale v. Palmer*, 52 Ind. 411.

Where a railroad company is liable to be assessed for such improvements, it will likewise be estopped if it stand by and see the improvements made without objection. *City of New Haven v. Fair Haven, etc., R. R. Co.*, 38 Conn. 422.

We have no doubt that such is the law in all cases where the owner of property liable to be assessed stands by and without objection sees improvements made which benefit his property.

The doctrine announced in the cases cited, as stated therein, rests, in a measure, upon statutory provisions to the effect that no inquiry shall be made into questions of fact arising prior to the time the contract is entered into for the improve-

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

ment, it being held that the property-owner, after allowing the improvement to proceed without objection, should be held to have waived all irregularities, if any existed, in the manner of ordering the improvement and letting the contract. Independent of the statutes upon the subject, it is probably true that a property-owner whose property is subject to assessment for street improvement, who sees improvements made which benefit his property, upon the faith that his property shall bear a part of the expense, and does not object to such improvement, would be estopped upon equitable grounds from denying his liability.

In this case, however, the property of the appellee, as we have seen, was not subject to assessment for street improvements.

The city had the right to make the improvement described in the complaint, and the appellee had no right to object thereto.

It was its duty to adjust its track in such a manner as to conform to the street in its improved condition. It does not appear that the appellee omitted to do anything which it had the right, or which was its duty to do, or that it did anything which it was not in duty bound to perform. Such a case we do not think falls within the authorities above cited.

In our opinion the appellee is not estopped from denying its liability for the assessment sought to be recovered in this case.

Impressed with the importance of the questions involved in this case, we have given them each a careful and laborious consideration, and feel warranted in saying that there is no error in the record for which the judgment should be reversed.

Judgment affirmed.

ELLIOTT, J., took no part in the consideration of this case.

Filed Jan. 10, 1891.

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

ON PETITION FOR A REHEARING.

COFFEY, J.—A petition for a rehearing has been filed in this case, supported by an able brief, in which it is contended that the opinion heretofore handed down is in conflict with the opinion of the Supreme Court of the United States in the case of *Sioux City Street R. W. Company v. Sioux City*, 138 U. S. 98, decided sixteen days after the opinion in this case was rendered. We have given the case referred to a careful consideration, and have reached the conclusion that it in nowise conflicts with the opinion heretofore rendered by this court in the case at bar.

It appears from the case cited that the code of the State of Iowa contains the following provision :

"SEC. 1090. The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organizations may be adopted or amended hereunder, shall, at all times, be subject to legislative control, and may be, at any time, altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

The Sioux City Railway Company obtained a charter from Sioux City to construct a street railway, binding itself to pave the streets used for that purpose, between the rails. Subsequently the General Assembly of that State passed an act requiring street railway companies to pave not only between the rails, but also one foot outside the rails. The question for decision in the case involved the power of the State of Iowa to impose this new burden on the street railway company, the contention of the company being that its charter constituted a contract between it and the city which could not be impaired by a legislative enactment without its consent. Upon the subject of this contention the

The Western Paving and Supply Co. v. The Citizens' Street Railroad Co.

court said: "Under section 1090 of the Iowa code, the legislature had the power not only to repeal and amend the articles of incorporation of the company, but to impose any conditions upon the enjoyment of its franchise which the general assembly might deem necessary for the public good. The reservation of this power was a condition of the grant. The city council could make no arrangement with the company which would not be subject, under that section, to the superior power of the general assembly. * *

"No question can arise as to the impairment of the obligation of a contract, when the company accepted all of its corporate powers subject to the reserved power of the State to modify its charter and to impose additional burdens upon the enjoyment of its franchise."

It will thus be seen that the question involved in the case cited was quite different from the questions involved in this case. In that case the whole question turned upon the power of the State of Iowa under the powers reserved by the section of its code set out above, while there is no question of reserved powers involved in the case now before us.

That the States, or municipalities, to which the powers of the State in that respect have been delegated, may contract away the right to tax, in a given case, seems to be settled by the decisions of the Supreme Court of the United States. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, and authorities cited.

Pursuant to the request contained in the petition for a rehearing, we have again gone over the questions involved in this case, and feel that there is no error in the opinion heretofore handed down.

Petition for a rehearing overruled.

Filed June 19, 1891.

The Terre Haute and Indianapolis Railroad Company v. Brunker.

No. 14,219.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY v. BRUNKER.

128	548
129	410
128	542
131	115
131	290
133	163
128	549
135	451
128	542
139	372
128	549
141	548
142	484
143	609
128	542
156	431
128	542
159	135

VERDICT.—*Special.*—*Conclusions of Law.*—*When Verdict not Vitiating.*—A special verdict is not vitiated by reason of stating conclusions of law, if, after eliminating all such conclusions, the necessary facts are fully set forth.

RAILROAD.—*Personal Injuries.*—*Negligence.*—*Crossing.*—*Failure to Give Signal.*—A railroad company will not be exonerated from liability in an action for personal injuries alleged to have been sustained by a traveller on the highway when its servants in charge of a train failed to give the proper signals for a crossing which the train was approaching, but did give a signal for a second crossing before reaching the first crossing, which signal was given at a point much nearer to the latter crossing than the signal required for that crossing, and the traveller who was upon the highway stopped and looked and listened and approached slowly, and continued to look and listen, seeing or hearing nothing, until his horses were in such close proximity to the train that they became frightened at the train, or at the sounding of the whistle for the second crossing, and he was injured in consequence thereof. As between the railroad company and the approaching traveller it induced him to approach to within an unsafe proximity to the crossing by the failure to give the lawful signals, and the train was not lawfully there as against the traveller without having first given the signal required by law before coming upon the crossing.

SAME.—*Special Verdict.*—*When not Defective.*—A special verdict in such a case is not defective which fails to find that the horses were docile, and that the traveller could have heard the signals if sounded, and would have stopped and could have controlled his horses at that distance.

INSTRUCTION TO JURY.—*Action for Personal Injuries.*—*Instruction as to Peril of Life.*—*Propriety of.*—An instruction in an action for damages for personal injuries alleged to have been sustained by the plaintiff, is not erroneous which states, among other things, that the jury should "take into account the peril, if any there was, to plaintiff's life," and which concludes with the statement that only such damages shall be assessed "as will reasonably and justly compensate the plaintiff for his injuries." It was proper for the jury to consider the hazard and jeopardy in which the plaintiff was placed; in other words, the peril to his life, and allow such damages as resulted therefrom in determining the damages which he sustained, and his suffering in body and mind by reason of the injury.

PRACTICE.—*Action for Personal Injuries.*—*Medical Examination of Party.*—*Motion for.*—*When Property Overruled.*—It was not error in an action for

The Terre Haute and Indianapolis Railroad Company v. Brunker.

personal injuries for the court upon the second trial of the cause to refuse to require the plaintiff to submit to an examination by medical experts, the motion to that effect not having been made by the defendant until after the plaintiff had put in his evidence and rested his case, and the motion not being supported by any affidavit showing any necessity for it, or any belief as to what such examination would develop.

From the Vigo Circuit Court.

B. Harrison, W. H. H. Miller, J. B. Elam, F. Winter and J. G. Williams, for appellant.

C. F. McNutt, — *Davis* and — *Davis*, for appellee.

OLDS, C. J.—This was an action by the appellee against appellant for damages for injuries received to his person, and properly alleged to have been caused by the negligence of the appellant.

The plaintiff, on the 8th day of May, 1885, about six o'clock in the evening, was driving a two-horse team and wagon, travelling east on the national road in the county of Putnam, about one mile and a half west of Reelsville. At that point the National road crosses the appellant's railroad. Appellee's horses became frightened when the train was approaching and passing the crossing, and appellee was injured.

Issues were joined on the complaint; there was a trial had, and a special verdict returned by the jury, and judgment on the verdict for the appellee.

The errors assigned are :

First. The court erred in overruling appellant's motion for judgment in its favor on the verdict.

Second. The court erred in sustaining appellee's motion for and in rendering judgment in favor of appellee on the verdict.

Third. The court erred in overruling appellant's motion for a new trial.

The jury by their special verdict found the following facts which are material to be considered in passing upon the questions presented :

That on the 8th day of May, 1885, the defendant was op-

The Terre Haute and Indianapolis Railroad Company v. Brunker.

crating the railroad, and the plaintiff, at about six o'clock P. M. on said day, was travelling eastward along the National road, a public highway; that he was driving two horses attached to a two-horse vehicle loaded with medicine; that he was upon a seat in the front part of said vehicle; that said highway at a point about one and one-half miles west of Reelsville, in Putnam county, crosses the Terre Haute and Indianapolis railroad; that plaintiff approached said crossing driving at ordinary speed in a walk; that when he came within about 100 yards of said crossing he stopped his team and both looked and listened for approaching trains, but saw none, and no train was then at a point visible from said point of observation, nor did plaintiff hear any sound or signal of an approaching train; that thereupon he drove his team walking toward the crossing; that the grade of said railroad at said crossing is and was about ten feet above the common level of the ground on which the road lay until within a little over 100 feet of the crossing, where it began gradually to rise upon a grade, which at the crossing is of the same height as the railroad; that when plaintiff had reached and entered upon the grade, and not till then, he saw a passenger train approaching from the east at a rapid rate of speed, to wit, at the rate of from 40 to 50 miles per hour; that immediately upon seeing the train, which was not more than from four to six hundred feet from the crossing, plaintiff leaped to the ground and ran to his horses' heads to hold them; that at about the time he discovered the approaching train, and as he was going to his horses' heads, and when the train was about three hundred and fifty or four hundred feet from said crossing, the whistle to the engine attached to the approaching train began to sound, and continued to so sound until at or about the crossing; that the horses attached to the plaintiff's wagon became so greatly frightened by the train that in attempting to break away from plaintiff they turned southward, dashed down a precipitous bank caused by the construction of said

The Terre Haute and Indianapolis Railroad Company v. Brunker.

grade, and at a point about three feet in height, knocked the plaintiff down, trampling upon him and drawing the wagon, which with its load weighed about thirteen hundred pounds, upon and across the arms and body of plaintiff, severely injuring him, without any fault on his part, and while he was in the exercise of reasonable prudence and diligence to prevent injury to his person and property; that as the train approached said crossing, and when not more than one hundred nor less than eighty rods from said crossing, the whistle of the engine was not sounded three times distinctly, nor was it between, at or within said points sounded at all, nor was the bell attached to said engine, if any was attached, rung as the train approached said crossing; that the defendant's agents and servants in charge of said train negligently failed to either sound the whistle or ring the bell of said engine so attached to said train; that said negligent failure to sound said whistle and ring said bell was the cause of the injury to plaintiff without his fault; that plaintiff was at the time of the injury about 53 years of age; that plaintiff did not hear the sound of the whistle nor the noise of the approaching train, though looking and listening for the same, until it had reached a point from four to five hundred feet from the crossing which he was approaching; that plaintiff had no knowledge of the time of the passage of the trains at that time at that point; that after leaving said point where the plaintiff stopped to look and listen there is no point on said railroad at which a train approaching from the east is visible to one approaching the crossing along the highway until such train passes a cluster or clump of timber near defendant's railroad, about six hundred feet east of said crossing; that prior to the injuries received as aforesaid, the plaintiff was a man of good health, and able to pursue his business, which was that of travelling with a wagon and team and selling and delivering medicines of which he was the proprietor, and at which pursuit he was able to earn a livelihood for himself

The Terre Haute and Indianapolis Railroad Company v. Brunker.

and family ; that by reason of his being knocked down and trampled upon, and run over by said wagon, his life was imperiled and his body and his limbs were severely and painfully injured and bruised, and he was severely injured in his lungs, which injury is permanent, and has caused, and is liable to cause, plaintiff great suffering at times, and on taking slight cold or making slight exertion, prostrating him and causing very great pain and suffering and peril to his life ; that by reason of said injuries he has been compelled to abandon and give up his business of travelling, to sell and deliver his medicine, whereby he has suffered and must suffer serious pecuniary loss ; that defendant is a railroad corporation, owning and operating a railroad extending from Indianapolis, in the State of Indiana, through Reelsville, Putnam county, Indiana, to the city of Terre Haute, in said State, and said railroad between Reelsville and a point two miles west thereof crosses a highway known as the National road four times, and also crosses within said distance another highway running from north to south on a section line, the fourth crossing of the National road being about sixty-one rods east of said section line highway, and about one hundred and sixty rods west of the third crossing of said National road ; that plaintiff was approaching the fourth crossing, and when about 300 feet west of said crossing he stopped, and while sitting in his wagon looked and listened, his eyes being six feet nine inches above the ground, and he could have seen a train approaching from the east at a point on defendant's railroad 1490 feet east of the fourth crossing of said National road ; no train was in sight, and he drove on to a point about 100 feet west of said fourth crossing, and at this last named point a west bound train on defendant's railroad came in view running from 35 to 50 miles per hour.

It is then again stated in the verdict that the plaintiff got down and went to his horses' heads ; that the whistle was sounded at the point, as before stated, and the horses became frightened and became unmanageable, and the wagon ran

The Terre Haute and Indianapolis Railroad Company v. Brunker.

over him, and that the whistle was not sounded at more than one hundred nor less than eighty rods of the fourth crossing, but was sounded within that distance before reaching the third crossing; then follows another statement as to plaintiff's injury, his health and business, both before and after his injury, giving it more in detail than in the former part of the verdict; and that the plaintiff's time before the injury was worth ten dollars per day, and concluding with the finding that if upon the facts the law is with the plaintiff the jury find for the plaintiff and assess his damages at \$4,400, and if the law be with the defendant the jury find for the defendant.

It is insisted that the verdict is insufficient to entitle the appellee to a judgment, for the reason, as stated by counsel, that it is a special verdict, and, being such, its function is to find facts and facts only, and that it is not good unless it finds all such facts as are necessary to enable the court to say, as an inference or conclusion, that the defendant was guilty of negligence causing the injury, and that the plaintiff was not guilty of negligence contributory thereto.

It is insisted that certain parts of the verdict, viz.: "That thereupon exercising reasonable prudence and caution, he drove his team, walking, toward the crossing;" again, referring to the plaintiff jumping from his wagon and going to his horses' heads, it is stated: "Which act we find to be a reasonable and prudent one under the circumstances;" again, after stating the manner of the injury, it is stated that he was "without any fault on his part and while he was in the exercise of reasonable prudence and diligence to prevent injury to his person and property," and again it is stated: "And we find that the defendant's agents and servants in charge of said train negligently failed to either sound the whistle or ring the bell of said engine so attached to said train; that said negligent failure to sound said whistle and ring said bell was the cause of the injury to the plaintiff without his fault," are mere conclusions and not findings of

The Terre Haute and Indianapolis Railroad Company v. Brunker.

facts, and must be disregarded, or in other words the verdict must be considered as if such statements were struck out of it.

We can not agree with the contention of counsel that all these statements in the verdict are mere conclusions. If, in the first, the words "exercising reasonable prudence and caution" may be said to be a statement of a conclusion which has no place in the verdict, the words "he drove his team, walking, toward the crossing," are clearly the statement and finding of a fact, and must remain in and constitute a part of the verdict, and be considered with the other facts found. The words "without any fault on his part," we think, may be properly stated in the verdict. It is necessary to allege in the complaint that the plaintiff is without fault; and no harm can result from the jury stating in their special verdict that the injury occurred without plaintiff's fault, and if it be a mere conclusion drawn from the facts it can make no difference in this case, since the facts upon which such conclusion is based are also stated, and from which the court was authorized to draw the same conclusion, viz., that the plaintiff was without fault, and we think the facts found fully justified the court in drawing such conclusion, and rendering judgment for appellee.

As regards the statement that the agents and servants in charge of said train negligently failed to either sound the whistle or ring the bell of the engine so attached to said train, all that can possibly be said to be improperly included in the verdict is the word "negligently," and if this be struck out it leaves the verdict stating the fact that they did not sound the whistle, from which the court might and would draw the conclusion that it was negligence if omitted to be sounded, when the law required it to be done.

This we deem to be all that it is necessary to say in regard to the conclusions, or what may be claimed to be conclusions, stated in the verdict, for, after eliminating from the verdict all that could possibly be regarded as conclusions,

The Terre Haute and Indianapolis Railroad Company v. Brunner.

and having no place in the verdict, the verdict then states the facts fully.

It finds the appellee was travelling upon the highway. When approaching the crossing, at a proper distance, and at the only point he could see the approaching train until he came in close proximity to the crossing, he then looked and listened; that when he approached this point his team was walking. He then proceeded with his team, walking, and continued to look and listen, without any warning, without any of the signals required by law having been given by the appellant's agents upon approaching that particular crossing. When the appellee was in close proximity to the crossing, the train came at a rapid rate of speed, frightening his horses; he at once leaped from his wagon to take his horses by the head and control them, but they were so frightened that he was unable to control them, and was injured. And it is further found that the appellee was guilty of no negligence on his part.

The inference and conclusion may clearly and rightfully be drawn from the facts found that the appellee having stopped, and looked, and listened, and not hearing or seeing any approaching train, and no signal being given for that crossing, the appellee was induced, and had the lawful right to proceed in a walk toward the crossing, and that it was by reason of the failure of the appellant's agents to give the proper signals that appellee approached within such close proximity to the crossing, and that it was by reason of being in such close proximity to the train that the appellee's horses became so frightened and unmanageable, which resulted in the injury to the appellee.

It is suggested by counsel that it is stated that the horses became frightened at the sounding of the whistle, and that the whistle was rightfully sounded at that point for the next crossing, and therefore appellant's agents were guilty of no negligence in sounding the whistle which caused the fright to the horses, but it is also stated in the verdict that they be-

The Terre Haute and Indianapolis Railroad Company v. Brunner.

came frightened at the moving train, and it appears that appellee was going up the grade at the time the train approached, and that no signal was given for the approach to the crossing of the highway that appellee was travelling upon.

The object of giving signals is to warn persons travelling upon the highway about to be crossed by the approaching train, and of the danger not only in attempting to cross the railroad track at the same time the train is running upon it at the same point, but of the danger of being in close proximity to the train with horses and vehicles, and to give travellers an opportunity not only of avoiding a collision, but danger arising from being in close proximity to it, and it is proper to presume that when such signals are given travellers will take heed and keep at a safe distance, and if they are travelling with horses liable to become frightened by being in close proximity to the train, they will stop advancing toward the crossing at once upon hearing the signal, and they have the right to rely upon the signals being given, and it will not exonerate a railroad company from liability when it has failed to give the signal for the approaching crossing, and a traveller who is upon the highway, stopping and looking and listening, and approaching slowly, and continuing to look and listen, and having now come in such close proximity that his horses became frightened at the train lawfully running upon the track, or the lawful sounding of the whistle at that point, to say the horses became frightened at the cars when lawfully running upon the track, or the sound of the whistle when lawfully sounded. As between the said railroad company and the approaching traveller, it induced him to approach to within an unsafe proximity of the crossing by the failure to give the lawful signals, and the train is not lawfully there as against the traveller without having first given the signal required by law before coming upon the crossing. *Indianapolis, etc., R. R. Co. v. McLin*, 82 Ind. 435; *Continental, etc., R. R. Co. v. Stead*, 95 U. S. 161;

The Terre Haute and Indianapolis Railroad Company v. Brunker.

Chicago, etc., R. R. Co. v. Boggs, 101 Ind. 522; *Louisville, etc., R. R. Co. v. Schmidt*, 81 Ind. 264.

It is suggested that to entitle the appellee to a judgment on the verdict, there should have been a finding as to the amount of noise made by the wagon, that the horses were docile, and that the appellee could have heard the signals if sounded, and would have stopped, and could have controlled his horses at that distance. We do not think so. These are matters which, if there is any presumption about them, the presumption would be in favor of the appellee. As we have said, signals are given to warn people. Why require a signal, if not upon the theory that it will be heard, and persons will take heed and avoid danger?

The presumption, if any exists, is that parties will avoid danger when warned, and not that they will knowingly, voluntarily and unnecessarily rush into danger. The appellants would have avoided all liability by having given the lawful signals.

Objection is made to the fourth instruction relating to negligence, but we do not think any question is presented by the instruction and objection to it different from that considered in passing upon the verdict, and as the jury returned a special verdict by which they were required to find the facts no harm could have resulted from it.

It is contended that the fifth instruction, given by the court, is erroneous. It relates to the measure of damages and is as follows:

“In this case, if the jury find that the plaintiff was injured by the wrongful negligent act of the defendants, the railroad’s agents and servants, and while plaintiff himself was acting with reasonable prudence, then in assessing his damages, the jury should take into account the peril, if any there was, to plaintiff’s life; the suffering of body and mind, if any there was; the fact, if it is a fact, as shown by the evidence, that the injury he suffered was and is permanent; the extent of it; how far, if at all, the injury renders him

The Terre Haute and Indianapolis Railroad Company v. Brunner.

less capable and fit to pursue his calling and business; any loss of time shown; its value, if shown; any expense incurred; and so considering said elements, the jury should assess such damages within the demand of the complaint as will reasonably and justly compensate plaintiff for his injuries."

The principal objection urged to this instruction is to that portion of the instruction which states that the jury should "take into account the peril, if any there was, to plaintiff's life." It is urged that by this instruction the jury are told that they are to first consider and allow plaintiff for the peril to his life, and then in addition thereto to allow him for his suffering in body and mind; that peril is not an element of damages; that a party may be in peril and be entirely unconscious of it and not suffer therefrom.

We do not think this instruction objectionable on the grounds urged. Peril means exposure to injury, loss or destruction, imminent or impending danger, risk, hazard or jeopardy. As shown by the facts in this case, the appellee was exposed to injury by a frightened team of horses, was thrown down, trampled upon by the horses, and run over by the team and wagon, he was in imminent danger, risk and hazard, his life was jeopardized by the frightening of his team. It was clearly proper to consider the hazard and jeopardy in which he was placed, in other words, the peril to his life, and allow such damages as resulted therefrom in determining the damages which he sustained, and the suffering of both body and mind which he sustained by reason of the injury. It certainly seems to us that it can not be contended with much force that when, under such circumstances, one's life is jeopardized by the negligent acts of another and injuries follow, as in this case, they are not liable for the damages sustained by the person by reason of being put in such a perilous position.

This instruction as we construe it, and as it is plainly expressed, only authorizes the assessment of such damages

The Terre Haute and Indianapolis Railroad Company v. Brunker.

“as will reasonably and justly compensate plaintiff for his injuries,” and it does not authorize the assessment of damages for putting appellee’s life in peril unless injury resulted therefrom, for it concludes with the clear and concise statement that he shall only be compensated for his injuries, and we think the only reasonable construction to be placed upon it is that the jury can only allow damages for the peril, if damages resulted therefrom, and does not authorize a double compensation for damages. There was no error in giving the instruction.

The further question is presented as to the ruling of the court in refusing to require the appellee to submit to an examination by medical experts.

The bill of exceptions shows that “after the plaintiff had rested his case in chief, defendant, by its counsel, in open court requested the plaintiff to submit to an examination by medical experts, so that his true condition at the time might be determined. But this request was by the plaintiff refused, and thereupon defendant, by its counsel, moved the court to require plaintiff to submit to such medical examination, for the reason, as then stated to the court, that the testimony of the medical experts introduced by the plaintiff exhibited a great and substantial difference of opinion between them as to the true condition of plaintiff shortly after the injury, shortly before the former trial of this cause, and shortly before the beginning of this trial. But the court overruled this motion of the defendant, and refused to require plaintiff to submit to an examination of his condition by medical experts, and to this ruling of the court the defendant at the time excepted.”

It is earnestly contended and ably argued by counsel for the appellant that this ruling is error.

It appears by the statement in the bill of exceptions that this application was made upon the second trial of the cause, after the appellee had put in his evidence and rested his case, and that then the motion was not supported by any affidavit

The Terre Haute and Indianapolis Railroad Company v. Brunker.

showing any necessity for it, or any belief as to what such examination would develop.

It was a mere request of counsel during the trial of the cause, after appellee had rested without showing even that it was believed any benefit would be derived from such examination. Were it an open question we would feel constrained to hold that there was no such error committed as authorized a reversal of the judgment. But the case of *Hess v. Lowrey*, 122 Ind. 225, is decisive of the question as here presented. See, also, *Kern v. Bridwell*, 119 Ind. 226.

We are cited in support of the position of counsel for the appellant upon this question to the case of *Alabama, etc., R. R. Co. v. Hill*, 90 Ala. 71, where it was held to be error to refuse to order such examination, but in that case prior to entering upon the trial a motion was made to require such examination, and again during the trial it was renewed and supported by affidavits showing a necessity for and a probable benefit to be derived from such examination, but here no such showing is made. As held in the case of *Alabama, etc., R. R. Co. v. Hill*, *supra*, the ordering of such examinations are to some extent in the discretion of the trial court, and probably if an application for such examination of a party was made in a proper case, supported by such a showing as it would be an abuse of discretion to overrule it, then it might be a sufficient error to reverse the judgment.

There is no such showing in this case that we can say there was an abuse of the discretion vested in the trial court.

There is no error in the record.

Judgment affirmed, with costs.

Filed Dec. 10, 1890; petition for a rehearing overruled June 19, 1891.

 Jamieson v. The Indiana Natural Gas and Oil Company et al.

No. 16,106.

**JAMIESON v. THE INDIANA NATURAL GAS AND OIL
COMPANY ET AL.**
CONSTITUTIONAL LAW.—Police Power.—Needful Regulations.—Legislature.—

Where a subject is within the police power of the State, the question as to what regulations are proper and needful is one for legislative consideration and decision.

SAME.—Legislature.—Usurpation of Power.—Presumption.—Courts will not presume that the Legislature has usurped power or disregarded the organic law. A party who asserts that the Legislature has usurped power or has violated the Constitution must affirmatively and clearly establish his position.

NATURAL GAS.—Qualities of.—Judicial Knowledge.—The courts will take judicial notice of the qualities of natural gas, and that it is in a high degree inflammable and explosive.

SAME.—Police Regulation.—Natural gas is so dangerous that its use may be made the subject of a police regulation.

SAME.—Transportation Through Pipes.—Pressure.—Act of March 4th, 1891, Regulating.—Validity of.—The act of March 4th, 1891 (Acts 1891, p. 89), regulating the mode of procuring, transporting and using natural gas, which prohibits the use of more than the natural pressure or an artificial pressure exceeding three hundred pounds to the square inch, is a valid exercise of the police power, and is constitutional.

SAME.—Regulation of Use of Property.—Vested Rights.—Said act is but a regulation of the use of property, and is not a taking of property without compensation, nor is it an interference with vested rights or in violation of the provision of the Federal Constitution that no person shall be deprived of property by any State without due process of law.

SAME.—Can not be Made Subject of General Commerce.—Natural gas can not be made the subject of general commerce between the States because of its local nature and intrinsic qualities, and it can not, so far as local safety is concerned, be made the subject of uniform Federal legislation, but is a legitimate subject for reasonable police regulation.

SAME.—Interstate Commerce.—Act of March 4th, 1891, not a Regulation of.—Case Distinguished.—Natural gas, because of its local characteristics and peculiarities, and its inherent dangerous qualities, is a proper subject for State legislation, and the act regulating the pressure to be employed in its transportation through pipes, while it affects a commercial commodity, is but an exercise of the police power—a regulation of the mode of using property—and is not a regulation of interstate commerce

128	555
129	474
128	555
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130	73
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181	402
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134	254
135	59
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138	401
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142	192
128	555
146	606
147	638
128	555
151	267
128	555
155	475
155	548
155	558
155	680
128	555
153	129
128	555
162	287

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

in the constitutional sense of the term. *State, ex rel., v. Indiana, etc., Co.*, 120 Ind. 575, distinguished.

OLDS, J., dissents.

From the Porter Circuit Court.

W. D. Holt, R. N. Lamb and R. Hill, for appellant.

W. E. Niblack, A. C. Harris and L. Cox, for intervenors.

R. C. Bell, S. R. Morris, J. Morris, J. M. Barrett, F. Winter and J. B. Elam, for appellees.

ELLIOTT, J.—The complaint of the appellant states these material facts: The Indiana Natural Gas and Oil Company is a corporation organized under the laws of Indiana for the purpose of drilling wells, procuring natural gas and supplying it to consumers. The appellant is a stockholder in that corporation. The Columbus Construction Company is also a corporation and is the owner of natural gas wells in many counties of this State. In June, 1890, the gas company entered into a contract with the construction company wherein it was provided that the latter company should acquire the right of way through Indiana and through Illinois to the city of Chicago; that it should construct for the gas company, on the right of way secured, a line of pipe for the transportation of natural gas, and should furnish all necessary machinery and appliances required to obtain and convey natural gas to consumers. In consideration of the purchase of the right of way and the furnishing and construction of pipe lines, machinery and appliances, the gas company agreed to issue and deliver to the construction company capital stock to the value of one million five hundred thousand dollars, and also to issue to the construction company four million dollars of its corporate bonds, and to secure their payment by a mortgage upon its property and franchises. The construction company, proceeding under the contract, acquired a right of way as agreed, and did purchase and lay down a line of pipe for a distance of twenty miles, and distributed pipe along the right of way for a distance of forty

Jamieson v. The Indiana Natural Gas and Oil Company et al.

miles. That company has purchased and has in readiness machinery and appliances to be connected with the line of pipes, and it is able, ready and willing to perform its part of the contract. Natural gas can only be transported to Chicago by pumping and under pressure. It will be impossible to transport it to that point at a pressure which does not exceed three hundred and twenty-five pounds to the square inch. The gas company will have no other assets or property than "its plant and system, and no means whatever of paying either the principal or interest of the corporate bonds," which are to be issued to the construction company, but its only means of paying such bonds or of redeeming its capital stock will be such as are derived from "the plant and system and the revenues, tolls, income and profits to be earned thereby in the transportation and sale of natural gas in the city of Chicago, and the sole value of its stock will depend upon the right and ability of said company to engage in and carry on, by means of its natural gas plant and system, the business of transporting natural gas to Chicago and there selling the same." The "plant and system can not be put to any other commercially profitable use than that of transporting natural gas to Chicago, and can only be used to advantage and profit by the use as aforesaid of the pumping machines and other artificial devices."

The complaint sets forth at full length the act of March 4th, 1891, and in addition to the averments of the facts already outlined contains these allegations: "The Indiana Natural Gas and Oil Company, by reason of the statute aforesaid, is prohibited from transporting said gas through said pipe line at more than the natural flow and pressure, or at a pressure in excess of three hundred pounds to the square inch, or from using any artificial device to increase or maintain the natural flow of the gas, the natural gas property, and plant constructed to be furnished and delivered to the defendant as aforesaid, will be of no value for the purpose of such plant, and of little or no value for any purpose to

Jamieson v. The Indiana Natural Gas and Oil Company et al.

said defendant, and the stock and bonds of the defendant will be wasted, and said company deprived of all the means of effecting the objects and purpose of its incorporation, and be rendered entirely insolvent."

Plaintiff further avers and charges, that the statute aforesaid has made it unlawful for said defendant, or any person in said State of Indiana, to transport natural gas through said pipe line at a pressure exceeding three hundred pounds per square inch, or the natural flow and pressure of such gas, or to use in such transportation any artificial device for the purpose, or which shall have the effect of increasing, or maintaining, the natural flow and pressure of such gas.

Wherefore plaintiff avers that it has become and is illegal for either of said defendant companies to further proceed with the execution of said contract, and that the defendant the Indiana Natural Gas and Oil Company, especially, ought not to be permitted to further proceed in the execution of said contract, the performance of which will result as aforesaid in a waste and destruction of almost its entire corporate assets, and make it entirely impracticable for it to carry out the objects and purposes of its incorporation, and will also involve it in liability for the payment of heavy penalties for the violation of said statute.

Plaintiff avers that immediately upon the taking effect of said statute he demanded of the board of directors of said the Indiana Natural Gas and Oil Company that they and the said company should at once desist from any other proceedings toward executing and carrying out said contract; and that they should abandon the said enterprise of transporting natural gas by the use of artificial pressure, or pressure in excess of three hundred pounds to the square inch, or other than the natural flow and pressure of said natural gas, and that they should at once rescind and abandon the said contract, but that said board of directors refused to do so, and declared that notwithstanding said statute, and regardless of the right of this plaintiff, they would proceed to

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

perform fully said contract as to all the obligations of the said the Indiana Natural Gas and Oil Company thereunder, and would not abandon the said enterprise of transporting natural gas by artificial pressure in excess of the natural flow and pressure, and in excess of three hundred pounds to the square inch; and that upon performance by said Columbus Construction Company of its part of said contract the said the Indiana Natural Gas and Oil Company would issue and deliver to said Columbus Construction Company its stock and bonds in all respects according to the terms of said contract.

Plaintiff further avers that in execution of said contract companies have already, and since the taking effect of said statute, connected their said pipe-line with certain gas wells in the county of Howard, in the State of Indiana, being wells which under said contract are to be acquired and used by said the Indiana Natural Gas and Oil Company, and by means of certain artificial devices for pumping, known as a pump, being a part of the machinery to be acquired and used by said the Indiana Natural Gas and Oil Company, did unlawfully transport the natural gas from said wells, through the said line of pipe in said county, at an artificial pressure in excess of three hundred pounds to the square inch, and in excess of the natural pressure and flow of said gas, to wit, at a pressure of four hundred and twenty pounds to the square inch, whereas the natural pressure of such gas was but, to wit, three hundred and twenty-five pounds to the square inch, and ever since have continued to, and still are so engaged in violating the provisions of said statute, whereby the said the Indiana Natural Gas and Oil Company has already incurred liability for the penalty prescribed by said statute, and will be subjected to further liability for such penalties unless the said defendant companies be enjoined as hereinafter prayed, which will result in further waste of the corporate assets and irreparable loss to this plaintiff. And plaintiff further avers that said defendant the Indiana

Jamieson v. The Indiana Natural Gas and Oil Company et al.

Natural Gas and Oil Company, unless enjoined from so doing, will issue to said Columbus Construction Company its bonds and stock as provided by said contract."

The trial court carried back the demurrer addressed to an answer filed by the appellees to the complaint, and gave judgment because of the insufficiency of that pleading. The ruling of the trial court in carrying back and sustaining the demurrer to the appellant's complaint is properly challenged by a specification in the assignment of errors.

We decide the case upon the ruling adjudging the complaint bad, and we neither give nor intimate an opinion upon any other ruling, nor upon any other questions than such as that ruling legitimately presents. We do not feel at liberty to consider any other questions than those designated, and upon none others do we give judgment, nor, indeed, can we decide any other questions without a departure from settled principles of procedure.

To determine what questions are legitimately presented to us, it is necessary to give a construction to the complaint which the trial court condemned, but it is only necessary to state in a very general way what we adjudge to be the nature of the complaint. We adjudge that the complaint is to be construed as charging that the contract of the corporation, of which the appellant is a member, with the Construction Company, is incapable of performance, because it requires a violation of the act of March 4th, 1891, in this, that it provides for and requires that natural gas be transported in pipes at a greater pressure than the natural pressure, or at an artificial pressure exceeding three hundred pounds to the square inch. We may further affirm it to be our judgment upon this phase of the case that there is here no question as to the right of a stockholder to maintain such a suit as this, for no such question is presented by the briefs or arguments, and we say, still further, that the essential and controlling question presented by the ruling upon the complaint, is whether a contract which can not possibly be performed with-

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

out a direct violation of a statute is invalidated by the enactment.

The complaint avers, and the demurrer admits, that the performance of the contract is impossible without violating the statutory provision that no greater pressure than three hundred pounds to the square inch shall be put upon pipes used for the transportation of natural gas. We are careful to state the questions upon which we give judgment, and to declare the construction which we give to the complaint upon which those questions arise, so that there may be no misconception of our decision.

It is obvious from what we have said that the central question here presented and here to be decided is this: Is the provision of the act of March 4th, 1891, prohibiting the use of more than the natural pressure or an artificial pressure exceeding three hundred pounds to the square inch, invalid because it violates the constitution of the United States or of the State of Indiana? The validity of that provision, and of that provision alone, demands our judgment. If the Legislature of Indiana has no power to require that the pressure put upon natural gas poured into pipes shall not exceed three hundred pounds where pressure is employed, the contract between the two corporations is legal, and the complaint is bad, if it has such power, the complaint is good.

The question, as the record presents it, is one of power. With questions of policy or expediency the courts have no concern. *License Cases*, 5 How. 504; *Hedderich v. State*, 101 Ind. 564. If a subject is within the legislative power, the question whether that power is wisely or unwisely exercised is not a judicial one. If the power exists, then the Legislature must determine the mode of its exercise, unless the mode is prescribed by the organic law. If, to descend from a wide generalization to a narrow one, a subject is within the police power of the State, the question as to what reg-

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

ulations are proper and needful is one for legislative consideration and decision. It is a cardinal principle of law that legislative discretion can not be controlled by judicial decisions, and is not subject to judicial surveillance. *Legal Tender Cases*, 12 Wall. 457 (561); *State, ex rel., v. Haworth*, 122 Ind. 462 (467).

It must be true, therefore, that if the Legislature of Indiana has power to regulate the pressure that shall be put upon natural gas taken from wells in this State and conducted into pipes laid in the soil of the State, it has, presumptively, at least, power to determine what limit the public safety requires to be placed upon the pressure employed. The question as it comes to us is not a broad one, involving the authority of the Legislature arbitrarily to enact a law destructive of property or commercial rights under the guise of exercising police power, for here there is regulation, and not destruction.

If artificial pressure is resorted to it must, as the statute declares, not exceed three hundred pounds to the square inch, and there is nothing in the complaint justifying the inference that this is an unreasonable regulation, or one made to accomplish an unlawful object. There are no facts presented warranting the inference that such a pressure is not reasonable or is not demanded for the public safety.

As the regulation prescribed by the statute is not one which appears on its face to be destructive of commercial interests or property rights, and as there is nothing in the complaint indicating a purpose to oppress or destroy, we can not, nor can any court, presume that there was any other purpose than the just one of regulating the use of essentially dangerous property for the good of the community. As there is power to regulate the use of property, the measure of regulation must, to a very great extent, be within the discretion of the Legislature. If it is true that the Legislature may not put some limit upon the pressure employed, then those who transport natural gas may, at their pleasure,

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

employ an unlimited degree of pressure, no matter to what extent persons and property are endangered. If it is not true that the Legislature may, in the exercise of its discretion, and within the scope of its power, determine what the pressure shall be, then no organ of government can determine it. If it be conceded that there is no legislative power to determine the question, and that it may be determined as particular controversies arise, then, the whole matter would depend upon the decision of individual judges or particular juries, and we should have acts criminal in some localities and innocent in others. But principle and authority forbid that the legislative judgment should be disregarded. As the question is presented in this case, it is power or no power. As the record stands there is no middle course, for we may not assume, in the absence of facts, that there was oppression or usurpation. It must be true that the provision of the act of 1891, regulating the pressure, is within the power of the Legislature, or it must be true that the Legislature is absolutely destitute of power over the subject.

The pleading upon which we give judgment, in this instance, does not require us to decide how far the Legislature may go in regulating the use of property not intrinsically dangerous. A distinctive and conspicuous feature of this case is that the property upon which the statute operates is dangerous and is of an extraordinary species and nature. That natural gas is a dangerous agency is a matter of common knowledge, and, hence, courts take judicial notice of that fact. We know, as the Legislature knew, and as every one knows, that natural gas is in a high degree inflammable and explosive. Surely no court would require evidence to inform it that artificial gas will ignite and explode, or that gunpowder and dynamite are intrinsically dangerous, and yet with quite as much propriety might it be claimed that without evidence a court can not know the qualities of any of the things named as to claim that a court can not take judicial notice of the qualities of natural gas. But we need

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

not, at this place, discuss this phase of the subject at length, for the adjudged cases very clearly show that the courts will take judicial notice of the qualities of such things as artificial gas, kerosene, gunpowder, dynamite, or the like. *Lanigan v. New York, etc., Co.*, 71 N. Y. 29; *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421; *Commonwealth v. Peckham*, 2 Gray, 514; *Schlicht v. State*, 56 Ind. 173; *Frese v. State*, 23 Fla. 267; *State v. Hayes*, 78 Mo. 307; *Lohman v. State*, 81 Ind. 15. We may, however, add that courts take judicial notice that natural gas is so far a necessity that the right of eminent domain may be invoked by a corporation to obtain a right of way for its pipes. *State, ex rel., v. Indiana, etc., Co.*, 120 Ind. 575; *Citizens', etc., Co. v. Town of Elwood*, 114 Ind. 332, and cases cited. It would be unreasonable to hold that the courts know judicially that natural gas is a public necessity so far as to warrant the exercise of the right of eminent domain, and yet hold that they do not know that it is inflammable and explosive. Knowing the one thing they must know the other. We hold, without hesitation, that natural gas is so dangerous that its use may be made the subject of a police regulation. Decision after decision recognizes the principle we have stated and upholds laws regulating the use of property. *Powell v. Pennsylvania*, 127 U. S. 678; *Dent v. West Virginia*, 129 U. S. 114; *Slaughter-House Cases*, 16 Wall. 36; *In re Quong Wo*, 13 Fed. R. 229; *Yick Wo v. Hopkins*, 6 Sup. Ct. Rep. 1064; *Electric, etc., Co. v. City, etc., of San Francisco*, 9 R. W. Corp. Jour. 494; *State v. Wordin*, 56 Conn. 216; *Eastman v. State*, 109 Ind. 278, and authorities cited. We conclude our discussion of this point by quoting from a recent opinion of the Supreme Court of the United States: "Some occupations," said that great court, "by the noise made in their pursuit, some, by the odors they engender, and some by the dangers accompanying them, require regulation as to the locality in which they shall be conducted. Some by the dangerous character of the articles used, manufactured or sold require, also, special

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

qualifications in the parties permitted to use, manufacture, or sell them. All this is but common knowledge." *Crowley v. Christensen*, 137 U. S. 86.

So far as the facts placed before us by the confessed allegations of the complaint will enable us to judge, there is nothing unreasonable in so regulating the pressure as to keep it down to three hundred pounds to the square inch. If the facts were such as to enable us to declare as matter of law that such a regulation was oppressive, unreasonable, or subversive of commercial rights, we should, perhaps, have a different question to determine, but in the pleading upon which we pronounce judgment there are no facts warranting any inference leading to the overthrow of the statutory provision here involved upon any such ground. When a case arises wherein it legitimately appears that under the pretext of enacting a police regulation the Legislature usurps power, invades property or commercial rights, then the courts will have to deal with questions different from those presented in this case.

The public safety and welfare is the highest consideration in all legislation, and to this consideration private rights must yield. No man has a right to so use a dangerous species of property as to put the safety of others in peril. Liberty does not imply the right of one man to so use property as to endanger the property of others, nor does ownership imply any such right. This is rudimental. It must, therefore, be true that the owner of property of such a dangerous nature as to require regulation to prevent injury to others can have no right paramount to the police power. It is not too much to say that as against the police power there is no such thing as a vested right. If the position of the appellees' counsel is tenable, then after a corporation has invested money in natural gas pipes, machinery and appliances, there can be no subsequent legislation, although the use of the pipes bought might put in peril towns, houses, and even human life along the entire line. The law is subject to no

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

such reproach as a rule like that for which appellees contend would bring upon it. No investment, however great, can so vest a right as to preclude the just exercise of a great governmental power such as that under which regulations for the protection of the health and safety of persons are enacted. This principle is supported by many decisions. In *Beer Co. v. Massachusetts*, 97 U. S. 25, it was said: "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature can not be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer." An emphatic assertion and an unanswerable demonstration of the principle was given in *Mugler v. Kansas*, 123 U. S. 623, given, too, in cases where many thousands of dollars of property were rendered worthless. The principle has found expression in lottery cases, in cases respecting noxious trades, and in cases respecting the use of dangerous articles. *State v. Woodward*, 89 Ind. 110; *Stone v. Mississippi*, 101 U. S. 814; *Railroad Co. v. Richmond*, 96 U. S. 521; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650 (672); *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *State v. Ad-dington*, 77 Mo. 110; *Stickrod v. Commonwealth*, 86 Ky. 285; *Welsh v. State*, 126 Ind. 71; *Day v. Woodworth*, 13 How. 362.

A familiar application of the principle is that made in the great number of cases which hold that railway companies may be compelled to fence their tracks. The decisions everywhere prove that the police power may sleep but it does not die. The question, when the dormant power shall be aroused, is, as we have suggested, one for legislative decision. "Under our system," said the court in *Mugler v. Kansas*, *supra*, "that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

protection of public morals, the public health, or the public safety."

It is a mistake to suppose that regulating the use of property under the police power is a taking without process of law. This seems so clear that it is hardly necessary to cite authorities, but, nevertheless, we can not forbear quoting from the opinion in *Mugler v. Kansas*, *supra*; "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, can not, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it." In the case at our bar there is no taking of property; there is simply a regulation of its use, leaving the ownership untouched. No owner has a right to use property in such a mode as to endanger the public safety, and hence no rights of ownership are impaired in a statute which protects the public safety by a reasonable regulation of the use of dangerous property.

We are satisfied that no provision of our State Constitution is violated by the act of 1891, and that it is not antagonistic to the fourteenth amendment of the Federal Constitution, nor to any provision of that instrument protecting vested or contract rights.

The general question which remains is that presented by the contention that the act of 1891 violates the provisions of the Federal Constitution vesting in Congress power over commerce between the States.

We preface our discussion of the principal question stated by saying that we are here concerned only with the general question of the power to regulate the pressure upon natural gas in pipes; for, according to the averments of the complaint, whether natural or artificial pressure be employed, the contract between the two corporations named can not be made effective without violating the act of 1891, by using

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

more pressure than three hundred pounds to the square inch. If there is power to regulate the pressure, then the corporation of which the appellant is a member ought not to be allowed to execute the contract described, since, under the confessed allegations of the complaint, it is impossible for one of the corporations to act without violating the statute. Courts are always reluctant to strike down a statute, or to decide constitutional questions, and they only decide them when imperatively necessary. Even then they decide only such as are absolutely essential to a disposition of the case, and are fully and clearly in the record. Cooley Const. Lim. (5th ed.), chap. vii.

Whether the act of 1891 usurps powers vested in Congress is to be determined from the language employed by its framers. If the language expressly or by necessary and unavoidable implication assumes to regulate interstate commerce, the act is a nullity. There is, however, no express regulation of interstate commerce, nor do we think that the necessary effect of the statute, when construed according to settled rules of law, is to limit or restrain commerce. If it were necessary to sustain the statute, and necessary to a decision of this case as made by the record to construe the statute as simply limiting artificial pressure to three hundred pounds, it would be our duty to so construe it, since that would be a sounder conclusion, in view of the provisions of the statute, than the conclusion that the Legislature intended to enact a statute which must be deemed a nullity. The rule is, that: "Before proceeding to annul, by judicial sentence, what has been enacted by the law-making power, it should clearly appear that the act can not be supported by any reasonable intendment or allowable presumption." *People, ex rel., v. Supervisors*, 17 N. Y. 235 (241.)

We have no right to presume that the Legislature usurped power, or disregarded the organic law. No precedent will justify such a presumption, nor any reason sustain it. A party who asserts that the Legislature has usurped power,

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

or has violated the Constitution, must affirmatively and clearly establish his position. Nor have the courts the right to so construe a statute as to render it void, where a construction that is reasonably admissible will uphold it. Cooley Const. Lim. (6th ed.), p. 218. This is elementary law. We are, therefore, not dealing with a case where there is nothing more than a question as to the meaning and effect of a statute. We are to resolve doubts in favor of the validity of the statute, "without," as an able court has said, "stopping to inquire what construction * * might be warranted by the natural import of the language used." *Dow v. Norris*, 4 N. H. 16 (18).

It is our plain duty to uphold the statute, if it can be done by just intendment and reasonable presumption; and the questions in the record do not require us to do more than decide upon the general question of the power to regulate the conveyance of natural gas in pipes.

Nothing in the words of the statute expresses or indicates a purpose to usurp a Federal power; if there be any such usurpation it is because of the effect of the statute, and not because of any direct attempt to regulate interstate commerce; but we have no right to ascribe such an effect to the statute, if any other fair and reasonable effect can be given it. We are not to destroy a statute when it can be fairly avoided.

A further prefatory suggestion seems appropriate, and that is this: The statute makes no discrimination; it operates upon all alike. It affects the citizens of Indiana as it does others, and not differently. We know, as matter of common knowledge, as all courts must know, that there are parts of our State farther distant from the gas fields than are parts of the States by which ours is bounded. It can not, therefore, be implied that the statute was directed against the citizens of other States.

In considering the principal question, two things are im-

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

portant: *First.* Locality; and *Second.* The character of natural gas. Of these in their order.

The pipes for the transportation of the gas must be laid in our soil; they must cross our farms, pass through our towns, and cross our highways. There are many persons, many houses, and much property along the line, within the borders of our State. There is danger to our inhabitants, and to their property from the use of defective or insecure pipes, as well as from an improper use of them. If a volatile, inflammable, and explosive substance, such as natural gas, can not be conveyed in pipes, under an unsafe pressure, without danger to those whom it is the duty of the commonwealth to protect, then regulation is not unreasonable or illegal in itself. The danger is to our citizens in their own homes, and on our own thoroughfares. It can not, we suppose, be successfully asserted that a gas company could use pipes of paper, or of spider-webs, at their pleasure; and yet, if there is no power in the State to regulate the character of the pipes, or the like, this conclusion must result. They, indeed, may do what they please. The danger to be avoided is within the State; the protection of the law ought, upon every principle of justice, to be commensurate with the danger. The legislation is local, is for local protection, and for, presumptively, at least, no other purpose. Gas companies acquire the right to lay pipes by virtue of the power of eminent domain resident in the State, and surely if they take the benefit of our laws, and use our lands and minerals, they must yield obedience to such laws as are framed for the local protection. If they seize private property, and occupy highways under local laws, they must conform to those laws in using the privileges vouchsafed to them. The right to lay pipes, to sink wells, and to do similar things, is local in every particular. It is, from first to last, local; it is so in the acquisition of the original right, and in the exercise of the right acquired. It is certainly as essentially and characteristically local as the right to erect telegraph poles,

Jamieson v. The Indiana Natural Gas and Oil Company et al.

conduct laundries, or operate elevators, and over these things the State may legislate although the legislation may indirectly or incidentally affect commerce. It seems true beyond fair controversy that the State, by virtue of its inherent power, may provide that pipes shall be laid in trenches, or shall be of sufficient strength to be safe. Otherwise they might be laid on the ground subject to the action of the elements, or be of inadequate strength and thus be fruitful of danger to persons and property. It also seems entirely clear that the State may declare that gas shall not be confined in insufficient tanks or reservoirs, as is done respecting petroleum in States where it is obtained. If it be true that such regulations may be made it must also be true that pressure may be regulated, and that the State must, to a great extent, be the judge of the nature and character of the regulations required.

The local character of such a substance as natural gas is, we repeat, marked and peculiar. It is a natural product, and its source is in the soil, or rocks of the earth. It is as strikingly local as coal or petroleum, and yet no one has ever questioned the power of a State to enact laws governing mining. If it be not true that the mining and conveyance of natural gas may be regulated for the protection of persons and property, it must be true that many mining laws are void. Coal-oil is subject to inspection and regulation, and so must be natural gas, for it is more dangerous than coal-oil. It is so essentially local that only local regulations can be effective or appropriate. It is found in very few localities, and the character of locality is impressed upon it more clearly and strongly than upon almost any other natural product in the world.

We have considered (very briefly, however, because time presses) the question of the power to regulate the use of natural gas because of the local character of the product, upon principle, and we now consider the question upon authority. The decisions clearly recognize a distinction be-

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

tween local and general matters. Necessarily this must be so, or else there would be no power in a State to declare where telegraph poles shall be placed, at what speed railroad trains shall be run through populous towns, or where noxious trades shall be conducted. To deny the power to regulate the use of a product so purely and exclusively local as natural gas would be to annihilate the police powers of the State.

The principle which we here enforce is thus stated by the Supreme Court of the United States in *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347: "Undoubtedly, under the reserve powers of the State, which are designated under that somewhat ambiguous term of police powers, regulations may be prescribed by the State for the good order, peace, and protection of the community. The subjects upon which the State may act are almost infinite, yet in its regulations with respect to all of them there is this necessary limitation, that the State does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution. Within that limitation it may, undoubtedly, make all necessary provisions with respect to the buildings, poles, and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may require." If regulations may be made concerning buildings and wires used by telegraph companies, it is impossible to conceive why they may not be made concerning pumps, pipes, or the like, of natural gas companies. There is infinitely more reason why the power should exist in the one case than in the other, since natural gas is a local product, intrinsically dangerous, and can only be conveyed from place to place in a peculiar mode.

There is another phase of the subject upon which the element of locality exerts an important influence. The local and peculiar character of natural gas makes it almost impossible that it should be the subject of a general national regulation. The principle here involved is affirmed in the strongest case that the appellees have adduced in support of

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

their position. In that case, *Leisy v. Hardin*, 135 U. S. 100, FULLER, C. J., speaking for the majority of the court, said: "Where the subject-matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress, and can not be encroached upon by the States; but where, in relation to the subject-matter, different rules may be suitable for different localities, the States may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power. *Cooley v. Port Wardens of Philadelphia*, 12 How. 299." But the principle had long before been stated in stronger and clearer terms, and it has been often asserted and enforced. *Mum v. Illinois*, 94 U. S. 113; *Sherlock v. Alling*, 93 U. S. 99; *County of Mobile v. Kimball*, 102 U. S. 691; *Ouachita, etc., Co. v. Aiken*, 121 U. S. 444; *Morgan, etc., Co. v. Louisiana Board, etc.*, 118 U. S. 455.

Upon this point we affirm that natural gas is characteristically and peculiarly a local product, that its production is confined to a limited territory, that because of its local characteristics and peculiarities it is a proper subject for State legislation, and can not, so far as regards local protection, be made the subject of general legislation by Congress; or, at all events, that it does "not require a uniform system as between the States" for its regulation.

We come now to a consideration of the question of the inherent dangerous qualities of natural gas as affecting the power of the State to regulate its use. We have already declared that it is a dangerous substance requiring regulation, and we shall only add to what we have said a quotation from the opinion in the case of *State v. Hayes*, 78 Mo. 307: "It was not necessary," said the court, "to aver that coal-oil is inflammable or to prove it. Courts and juries will take cognizance of such matters as are of common knowl-

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

edge, and pertain to the affairs and experience of almost every man's daily life. Courts do not require proof that fire will burn, or powder explode, or gas illuminate, or that many other processes in nature and art produce certain known effects. 1 Greenl. Ev., section 56; *Brown v. Piper*, 91 U. S. 37; *Udderzook's Case*, 76 Pa. St. 340; *Garth v. Caldwell*, 72 Mo. 622; *Nagel v. Missouri Pac. R. W. Co.*, 75 Mo. 665 (666)." As natural gas is dangerous it is a proper subject for police regulation, and the affirmation of this proposition is a sufficient refutation of appellees' argument that it may be assumed that the statute, under guise of the police power, attempts to regulate interstate commerce, and thus usurps a Federal power. What the rule would be if natural gas were an article not dangerous, such as corn, wheat, or the like, we need not inquire, since the record does not present any such question.

The rule that courts take notice of geographical, historical or natural facts extends far and is an unbending one. In the case of *Jones v. United States*, 137 U. S. 202, the Supreme Court fully reviewed the authorities and declared that averments in a pleading would be disregarded in every instance where the court judicially knew that they were not true. We can not quote at length from the opinion, but must content ourselves with saying that it asserts in the strongest possible terms that what is judicially known to be false no pleading can effectively aver to be true. The practical application of this old and familiar doctrine to this case requires us to assert that the courts judicially know that natural gas is a local product that can not be handled, stored, or transported as an ordinary commercial commodity without imperiling life and property.

If natural gas can not be safely transported to a State distant from its source, it is because of its natural qualities, and not because of legislation. The restriction upon transportation, if there be any, is in the inherent nature of the thing itself; none is put upon it by the statute, since the statute

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

does no more than regulate its conveyance from the wells to points of distribution in such a mode as to protect lives and property. This it does, and nothing more. If the distribution within the State can not be made at safe pressure, it is because of the character of the local natural product, not because of any standard of pressure fixed by legislation. Fixing the standard of pressure is not a regulation of interstate commerce; possibly it might be different if the product were not a local one, and intrinsically dangerous; but natural gas is local, and is dangerous in its transportation and use. It is the inherent element of danger that makes it necessary to handle, store, and transport natural gas in peculiar modes, and under reasonable restrictions.

It is true that natural gas may be an article of commerce, but it is not an ordinary article of commerce. It is not a commercial commodity while in the earth, it is only so when it ceases to become real estate and becomes personal property. It can not in any event become an ordinary article of merchandise in which no dangerous elements combine. In a limited and qualified sense it is a commercial commodity, but the limitation is not put upon it by any statute. That is done by nature. It is, no doubt, so far a commercial commodity that this State can not prohibit its transportation to another State by direct legislation. *State, ex rel., v. Indiana, etc., Co., supra.* If it can be taken from the well and transported to another State under a safe pressure the State can not prohibit its transportation, nor can the State establish one standard of pressure for its own citizens and another standard for the citizens of other States. But nothing of the kind is attempted directly or indirectly, for, as we have shown, there is one standard and no prohibition. The standard is for all. If it is such as will allow the transportation of natural gas to other States, there is no restriction or burden upon interstate commerce. If there is a prohibition in any sense, or to any extent, it is in the nature of the commodity itself, but there is no prohibition.

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

We have shown, as we believe, that natural gas, because of its local nature and intrinsic qualities, can not be made the subject of general commerce between the States, and have thus established the conclusion that it can not, so far as local safety is concerned, be made the subject of uniform Federal legislation, but is a legitimate subject for reasonable police regulation. But if it be conceded that it is the subject of general commerce between the States, it may, nevertheless, be the subject of legislation by the State in so far as the regulation is local. In every case in which there is an authoritative decision upon the question it is affirmed that the States may make police regulations, although articles of commerce may be affected by such regulations. Interstate commerce, it is true, can neither be burdened nor restricted. *State v. I. & O., etc., Co., supra*. But the establishment of a reasonable police regulation for the local safety is neither a burden nor a restriction within the meaning of the law; since, if there be a lawful exercise of a governmental power, there can be no wrong. Our own cases recognize the power to enact reasonable police regulations concerning articles of commerce. *State v. I. & O., etc., Co.*, p. 580. But our decisions are of comparatively little importance upon this question, since the question is one to be determined by the decisions of the Supreme Court of the United States. The most familiar instances of the exercise of police power over commercial commodities are those wherein intoxicating liquors were the subject of legislation, and it has been uniformly held that such commodities are subject to State authority. *Crowley v. Christensen, supra*; *Mugler v. Kansas, supra*, and authorities cited.

In asserting this we are not unmindful of the decision in *Leisy v. Hardin*, 135 U. S. 100, but that decision is easily discriminated from the class of cases to which we have referred as well as from the case before us. In *Leisy v. Hardin, supra*, the State legislation was condemned because it operated directly upon an ordinary and world-wide article of

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

commerce. We do not assume that a State can legislate for the regulation of interstate commerce—that power is undoubtedly Federal—nor do we assume that under the guise of exercising the police power there may be a regulation of commerce between the States, but we do assume that it is settled by the decisions that State legislation is not invalid simply because it operates upon or affects commercial commodities or instrumentalities. So long as there is nothing more than an exercise of the police power, and no regulation of commerce, there is nothing more than the exercise of a State power.

In *Prigg v. Pennsylvania*, 16 Pet. 539, Judge STORY, speaking for the court, said: "The police power belonging to the States, in virtue of their general sovereignty, extends over all subjects within the territorial limits of the State and has never been conceded to the United States." This general doctrine is affirmed in many cases, and it is conceded in the majority opinion in *Leisy v. Hardin*, *supra*. We know that the decision in that case affirms that where the whole subject is Federal, the States can exercise no power, but that doctrine we neither dispute nor deny, although we do affirm that it is not applicable to such a case as this. In affirming that State police regulations may rightfully operate upon articles of commerce we do not affirm that commerce may be regulated. If police regulations can not operate upon articles of commerce, then there are few kinds of personal property upon which they can operate. To deny that State legislation can operate upon commodities that are commercial is to practically annihilate it, for it is difficult, if not impossible, to conceive any species of personal property that is not commercial. But it is by no means only property such as intoxicating liquors upon which the police power of a State may be exercised. In the case of *United States v. Dewitt*, 9 Wall. 41, a penalty was imposed by a United States statute upon any person who should offer for sale oil manufactured

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

from petroleum unless it was of a designated specific gravity, and it was held that such a power belonged to the police power of the State.

A similar question came before the court in *Patterson v. Kentucky*, 97 U. S. 501, and the State statute was upheld. The opinion in that case so fully and ably discusses the question that we can not forbear quoting from it at some length. The learned judge, by whom the court spoke, said: " 'In the American constitutional system,' says Mr. Cooley, 'the power to establish the ordinary regulations of police has been left with the individual States, and can not be assumed by the national government.' Cooley Const. Lim. 574. While it is confessedly difficult to mark the precise boundaries of that power, or to indicate by any general rule the exact limitations which the States must observe in its exercise, the existence of such a power in the States has been uniformly recognized in this court. *Gibbons v. Ogden*, 9 Wheat. 1; *License Cases*, 5 How. 504; *Gilman v. Philadelphia*, 3 Wall. 713; *Henderson v. Mayor of the City of New York*, 92 U. S. 259; *Railroad Co. v. Husen*, 95 Id. 465; *Beer Co. v. Massachusetts*, *supra*, p. 25. It is embraced in what Mr. Chief Justice MARSHALL, in *Gibbons v. Ogden*, calls that 'immense mass of legislation' which can be most advantageously exercised by the States, and over which the national authorities can not assume supervision or control. 'If the power only extends to a just regulation of rights, with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the State, and its exercise for the regulation of the property and actions of its citizens, can not well constitute an invasion of national jurisdiction or afford a basis for an appeal to the protection of the national authorities.' Cooley Const. Lim. 574. By the settled doctrines of this court the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the national government. The Kentucky statute under examination manifestly belongs to that class of legislation. It is, in the best sense, a mere police regulation, deemed essential for the protection of the lives and property of citizens. It expresses in the most solemn form the deliberate judgment of the State that burning fluids which ignite or permanently burn at less than a prescribed temperature are unsafe for illuminating purposes. Whether the policy thus pursued by the State is wise or unwise, it is not the province of the national authorities to determine. That belongs to each State, under its own sense of duty, and in view of the provisions of its own Constitution. Its action, in those respects, is beyond the corrective power of this court. That the statute of 1874 is a police regulation within the meaning of the authorities is clear from our decision in *United States v. Dewitt*, *supra*. By the internal revenue act of March 2d, 1867, a penalty was imposed upon any person who should mix for sale naphtha and illuminating oils, or who should knowingly sell or keep for sale, or offer for sale, such mixture, or who should sell or offer for sale oil made from petroleum for illuminating purposes, inflammable at less temperature or fire-test than 110° Fahrenheit. We held that to be simply a police regulation, relating exclusively to the internal trade of the States; that, although emanating from Congress, it could have by its own force no constitutional operation within State limits, and was without effect, except where the legislative authority of Congress excluded, territorially, all State legislation, as, for example, in the District of Columbia."

Other decisions assert like principles: *Webber v. Virginia*, 103 U. S. 348; *Turner v. Maryland*, 107 U. S. 38; *Cooley v. Board, etc.*, 12 How. 299; *Crandall v. State*, 6 Wall. 35; *Knox v. Lee*, 12 Wall. 457; *Slaughter-House Cases*, 16

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

Wall. 36; *Coleman v. Tennessee*, 97 U. S. 509; *Presser v. Illinois*, 116 U. S. 252; *Tennessee v. Davis*, 100 U. S. 257. The principle we have stated is involved in the cases where regulations were made respecting the instrumentalities of commerce. It is involved in the very numerous cases already mentioned requiring railroads to fence their tracks; it is involved in cases requiring trains to stop at the crossing of other railroads, and in many other cases of like character. It is strongly and broadly asserted in the cases which hold valid State statutes requiring trainmen, or engineers, to be examined as to their qualifications, as well as in cases concerning pilots. *Smith v. Alabama*, 124 U. S. 465; *Nashville, etc., R. W. Co. v. Alabama*, 128 U. S. 96; *Sherlock v. Al-ling, supra*; *Cooley v. Board, etc.*, 12 How. 299; *Ex parte McNiel*, 13 Wall. 236; *The Panama*, Deady, 27; *Ex parte Siebold*, 100 U. S. 371; *Wilson v. McNamee*, 102 U. S. 572; *State v. Penny*, 19 S. C. 218. In the first of the cases cited it was said:

“The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns, and cities, are all matters naturally and peculiarly within the provisions of that law, from the authority of which the modern highways of commerce derived their existence. The rules prescribed for their construction, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce.”

The provision of our statute of 1891, limiting the pressure upon natural gas confined in pipes, is certainly as essentially a police regulation as any of the acts enumerated by the Supreme Court of the United States in the case from which we have quoted. It is equally as clear that it is not

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

per se a regulation of interstate commerce. Pipes are local vehicles of conveying the dangerous product, and pressure is the power locally employed.

The decisions relied upon by the appellees do not oppose the conclusion that the use of such an article as natural gas may be regulated. In our own case of *State, ex rel., v. Indiana, etc., Co., supra*, the statute was, in terms, a regulation of commerce between the States, and, moreover, was an absolute inhibition upon the exportation of natural gas, so that the decision there made is not in point. Of *Leisy v. Hardin, supra*, we need only say, in addition to what has been already said, that the State law there overthrown by a majority of the court was a direct prohibition of the sale of a general article of commerce in its original form, not a regulation of its use. It is obvious that regulating the use of a dangerous article is a very different thing from prohibiting its sale, and still wider is the difference where, as here, the article is inherently dangerous, and not of an ordinary commercial character. The cases of *Welton v. State*, 91 U. S. 275; *Brown v. Houston*, 114 U. S. 622; *Walling v. Michigan*, 116 U. S. 446, involved the power of a State to levy a tax upon interstate commerce, and are not of controlling force upon such a question as that before us, because they are not relevant to the point in dispute. The case of *Bowman v. Chicago, etc., R. W. Co.*, 125 U. S. 465, involved the validity of a State statute absolutely prohibiting the importation of a commercial commodity, and it is without influence here, for here we have no such question. *County of Mobile v. Kimball, supra*, decides that a municipal corporation may be authorized to issue bonds to improve a harbor, but decides nothing that lends support to the appellees' assault upon the act of 1891. It does, however, contain statements that give strong support to the proposition that local matters may be regulated by State laws although they are connected with interstate commerce. The cases of *Chy Lung v. Freeman*, 92 U. S. 275, and *Henderson v. Mayor*, 92 U. S. 259, relate entirely to the power of a State

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

to regulate immigration, and pour little or no light on the question with which we are here concerned. In *Hannibal, etc., R. R. Co. v. Husen*, 95 U. S. 465, it was held that a State could not prohibit the importation of cattle, but here we have no such question, for here there is no prohibition; there is merely the regulation of the mode of conveying from the wells a local product of an intrinsically dangerous nature. The case of *Kimmish v. Ball*, 129 U. S. 217, modifies the decision in *Hannibal, etc., R. R. Co. v. Husen, supra*, or, at least, explains it. But in *Hannibal, etc., R. R. Co. v. Husen, supra*, it was said: "Many acts of a State may, indeed, affect commerce without amounting to a regulation of it, in the constitutional sense of the term." This doctrine is directly applicable here, for here the statute regulates the use of a dangerous substance and thus incidentally affects commerce, but it is not a regulation of commerce "in the constitutional sense of the term."

A regulation of the mode of using property is not necessarily prohibition, or restriction, and the statute before us is no more than such a regulation. The opinions in the cases of *Minnesota v. Barber*, 136 U. S. 313, and *Brimmer v. Reberman*, 138 U. S. 78, were written by the same great judge, Mr. Justice Harlan, who wrote the opinions in *Patterson v. Kentucky, supra*, and in *Smith v. Alabama, etc., Co., supra*, and there is not in them the slightest intimation of a departure from the doctrine of the former cases; on the contrary, those doctrines are adhered to, and the meat inspection laws were condemned because they discriminated against the citizens of other States. In the latter case it is said: "The case, in principle, is not distinguishable from *Minnesota v. Barber*, where an inspection statute of Minnesota, relating to fresh beef, veal, mutton, lamb, and pork, was held to be a regulation of interstate commerce and void, because, by its necessary operation, it excluded from the markets of that State, practically, all such meats—in whatever form, and although

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

entirely sound and fit for human food—from animals slaughtered in other States.”

The difference between the meat inspection cases and the present is essential and clear. Here there is no discrimination; here there is nothing more than the regulation of a natural, local and intrinsically dangerous product; while in the inspection cases there was discrimination; indeed, absolute prohibition, and the article was not dangerous, nor of a local or unusual character.

In *Minnesota v. Barber*, *supra*, the court shows very clearly the difference between that case and the case of *Patterson v. Kentucky* (which is cited with approval), and in doing this proves that the principle asserted in *Patterson v. Kentucky*, rules here, and that the doctrine of *Minnesota v. Barber*, is not relevant to such a question as the one presented by the ruling upon the complaint before us.

The trial court erred in sustaining the demurrer to the complaint, for in thus ruling it adjudged that the provision of the act of 1891, regulating the pressure that may be placed upon natural gas, confined in pipes, is void. That was the question before it upon the complaint, and it is the question before us. The effect of this ruling was to adjudge that the appellant's complaint did not state a cause of action, for the reason that the statutory provision referred to was, upon the case stated by the pleading, unconstitutional. Beyond that case the trial court could not justly go, nor can we.

For the error in sustaining the demurrer to the complaint the judgment is reversed.

Filed June 20, 1891.

INDIVIDUAL OPINION.

MCBRIDE, J.—The Legislature may undoubtedly provide for the regulation of the mode of procuring, using and transporting natural gas. In so far as the act of March 4th, 1891, attempts to do this, it is a legitimate exercise of the police

Jamieson v. The Indiana Natural Gas and Oil Company et al.

power of the State, and not an interference with the power of Congress to regulate interstate commerce.

Section 1 of the act, however, contains a provision which, literally construed, forbids the transportation of natural gas through pipes otherwise than by the natural pressure of the gas flowing from the wells, and section 2 contains a provision which, similarly construed, declares it to be unlawful to use any device or artificial process or appliance to maintain the natural flow of natural gas.

These provisions are not in the nature of regulations, but are prohibitory in their character. They are, however, independent provisions, which may be eliminated from the statute without materially impairing its efficiency, if its purpose is simply to regulate the production, transportation and use of natural gas.

As I understand the principal opinion, it holds that, notwithstanding these provisions of the statute, artificial pressure may be applied, provided it does not exceed three hundred pounds to the square inch. Whether this conclusion is reached by construction, or by eliminating the objectionable features of the statute, is not material. I concur in the conclusion reached.

Filed June 20, 1891.

DISSENTING OPINION.

OLDS, J.—I can not concur in the main opinion in this case. There are many propositions stated in the main opinion, and ably discussed and supported by copious quotations and citations of authorities, with some of which I agree, but do not regard them as decisive of the questions involved in this case.

As it seems to me, the question as to the validity of the complaint depends upon the validity and construction of the act of the Legislature of Indiana passed by the General Assembly March 4th, 1891, which is as follows :

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

"An act to regulate the mode of procuring, transporting and using natural gas, and declaring an emergency.

"Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That any person or persons, firm, company or corporation engaged in drilling for, piping, transporting, using or selling natural gas may transport or conduct the same through sound, wrought or cast iron casings and pipes tested to at least four hundred pounds pressure to the square inch: *Provided*, Such gas shall not be transported through pipes at a pressure exceeding three hundred pounds persquare inch, nor otherwise than by the natural pressure of the gas flowing from the wells.

"Sec. 2. It is hereby declared to be unlawful for any person or persons, firm, company or corporation to use any device for pumping or any other artificial process or appliance for the purpose, or that shall have the effect of increasing the natural flow of natural gas from any well, or of increasing or maintaining the flow of natural gas through the pipes used for conveying and transporting the same.

"Sec. 3. Any person or persons, firm, company or corporation violating any of the provisions of this act shall be fined in any sum not less than one thousand dollars nor more than ten thousand dollars, and may be enjoined from conveying and transporting natural gas through pipes otherwise than in this act provided: *Provided*, That nothing in this section shall operate to prevent the use of nitro-glycerine or other explosives for shooting any well or wells from which the gas is procured.

"Sec. 4. It is hereby declared that an emergency exists for the immediate taking effect of this act, and the same shall take effect from and after its passage."

In my opinion the decision is erroneous. This law does not seem to me to have been framed with an intention or with an effort on the part of the General Assembly to exercise the legitimate police power vested in the State. It does not attempt to regulate the transportation of natural gas, but

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

its sole purpose is to prohibit the transportation, sale and use of gas beyond the distance which the natural pressure from the well will transport it. Strictly construed, according to the letter, it does not permit its transportation through pipes at the natural well pressure, if such pressure exceed three hundred pounds to the square inch, nor does it permit any artificial method or device to increase the natural well pressure to that standard if the well pressure should be below the amount of pressure designated.

The statute, upon its face, admits that the transportation of gas at a pressure of three hundred pounds to the square inch through sound wrought or cast iron casings and pipes tested to at least four hundred pounds to the square inch is safe, yet it prohibits the increase of the pressure of a well of less pressure than that degree, and prohibits any transportation by artificial methods, even to this extent, though admitting it is safe to do so.

In the case of *State, ex rel., v. Indiana, etc., Co.*, 120 Ind. 575, this court said: "In order to give any force to this contention it is necessary to determine, at the outset, whether natural gas can be considered an article of commerce. With this preliminary question we have but little difficulty. Natural gas is as much an article of commerce as iron ore, coal, petroleum, or any other of the like products of the earth. It is a commodity which may be transported, and it is an article which may be bought and sold in the markets of the country." In support of this proposition the following authorities were cited. *Citizens', etc., Co. v. Town of Elwood*, 114 Ind. 332; *Carother's Appeal*, 118 Pa. St. 468; *Columbia Conduit Co. v. Commonwealth*, 90 Pa. St. 307; *West Virginia, etc., Co. v. Volcanic Co.*, 5 W. Va. 382; *The Daniel Ball*, 10 Wall. 557; *Kidd v. Pearson*, 128 U. S. 1.

This court further said: "The gas in the earth may not be a commercial commodity, but, when brought to the surface and placed in pipes for transportation, it must assume that character as completely as coal on the cars or petro-

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

leum in the tanks." The doctrine contained in the quotations which I have made from *State, ex rel., v. Indiana, etc., Co., supra*, is well supported by authority, and with it I most fully concur.

That gas and petroleum are to some extent inflammable, explosive and dangerous, I am free to admit, and that courts take judicial knowledge of the fact. But coal is in common use for fuel; petroleum in common use for lighting purposes, and to some extent for fuel; natural gas, in the communities where it is mined and has been carried through pipes, is in common use as fuel and for heating purposes, and to some extent for lighting purposes; and but few, if any, more accidents or deaths occur from its use than do from the use of coal or petroleum. We read of accidents and deaths occurring in various ways from the use of coal and petroleum as well as natural gas. As well might the Legislatures of the various States, within the borders of which there are oil fields, pass a law prohibiting the pumping of the oil from wells and the transportation of the same to any greater distance than its natural flow from the wells will carry it, while admitting that it can be safely transported in casks and tanks, as to say that the Legislature, while admitting that natural gas may be transported with safety in pipes at a pressure to the extent of three-fourths of the tested pressure of the pipes, may prohibit its transportation by artificial methods or devices in the same safe manner by a pressure not exceeding three-fourths of the tested pressure of the pipes through which it is transported; either of which propositions seem to me to be a prohibition, an interference with commerce against the rights of citizens in the free disposition of their property, and unfounded in law.

It is not necessary in this case to deny that the Legislature has a right to exercise police power over the transportation of natural gas, for, admitting that it has, and can exercise it to a reasonable extent, so as to prevent its transportation in a careless, reckless and unsafe manner, unnecessarily endan-

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

gering its citizens, still I do affirm that the Legislature can only exercise this power to a reasonable extent, so as to secure its transportation in a safe manner, as not to unnecessarily endanger the citizens of the State, and that it can not under the color of exercising a police power absolutely prohibit its transportation and sale in a safe manner to suitable markets, and the latter is what is attempted to be done by this statute.

This statute, conceding that natural gas can be transported in the manner stated, prohibits its transportation beyond the distance it will naturally flow from the wells, which it is admitted in argument is not to exceed sixty or seventy miles at farthest.

As said in the case of *State, ex rel., v. Indiana, etc., Co., supra*, natural gas is an article of commerce, and the owner of it may sell it for use within the distance which it may be transported by the natural flow of the well, or beyond such distance, and it may be transported in a proper and safe manner beyond that distance by artificial methods, and this can not be prohibited by legislative enactment.

In the case of *Matter of Application of Jacobs*, 98 N. Y. 98 (110), after citing and quoting from numerous authorities, in speaking of the police power of the State, the court says: "These citations are sufficient to show that the police power is not without limitations, and that in its exercise the Legislature must respect the great fundamental rights guaranteed by the Constitution. If this were otherwise, the power of the Legislature would be practically without limitation. In the assumed exercise of the police power in the interest of the health, the welfare or the safety of the public, every right of the citizen might be invaded and every constitutional barrier swept away. Generally it is for the Legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its dis-

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

creation is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property can not be arbitrarily invaded, and the determination of the Legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the Legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

In the case of *Mugler v. Kansas*, 123 U. S. 623, the eminent jurist, Justice HARLAN, speaking for the highest court of the world, said: "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." See *Minnesota v. Barber*, 136 U. S. 313.

It will not be controverted that the owner of land is the owner of gas mined upon his own land; that it is his property.

The right of private property includes the right to dispose of all one's legal acquisitions without illegal restraint or diminution. These principles are almost as old as the law itself.

The Constitution of the United States provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

The Constitution of Indiana, in the bill of rights, declares

Jamieson v. The Indiana Natural Gas and Oil Company *et al.*

that "all men are endowed with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." It is also declared that "No man's property shall be taken by law without just compensation."

See the following authorities, as bearing upon the questions involved in the case: *Hennessey v. City of St. Paul*, 37 Fed. Rep. 565; *Cole v. Kegler*, 64 Iowa, 59; *Harvey v. Dewoody*, 18 Ark. 252; *State v. Mott*, 61 Md. 297; *Manhattan Manufacturing, etc., Co. v. Van Keuren*, 23 N. J. Eq. 251; *Glenn v. Mayor*, 5 Gill & J. 424; *Bills v. Belknap*, 36 Iowa, 583; *Everett v. City of Council Bluffs*, 46 Iowa, 66; *Quenton v. Burton*, 61 Iowa, 471; *Everett v. City of Marquette*, 53 Mich. 450; *Ames v. Port Huron Log Driving, etc., Co.*, 11 Mich. 139; Sedgwick on Stat. and Const. Law, p. 534; *New Albany, etc., R. R. Co. v. Peterson*, 14 Ind. 112; *Acton v. Blundell*, 12 M. and W. 324; *City of Greencastle v. Hazelett*, 23 Ind. 186; *Haldeman v. Bruckart*, 45 Pa. St. 514; *Wheatley v. Baugh*, 23 Pa. St. 528; *Taylor v. Fickas*, 64 Ind. 167; *Angell Watercourses*, sections 94, 135; *State, ex rel., v. Woodruff Sleeping, etc., Co.*, 114 Ind. 155; *Hannibal, etc., R. R. Co. v. Husen*, 95 U.S. 465; *County of Mobile v. Kimball*, 102 U.S. 691; *Walling v. People, etc.*, 116 U. S. 446; *Leisy v. Hardin*, 135 U.S. 100; *Minnesota v. Barber, supra*; *Brimmer v. Rebman*, 138 U. S. 78.

It is clearly apparent that the statute in question had for its purpose the prohibition of the transportation of natural gas, and confining its use and sale to a limited territory; curtailing its use, diminishing its value, abridging the rights of the owners, and other persons who might wish to buy and transport it to markets beyond the distance which the natural well pressure will carry it, absolutely prohibiting its use and sale beyond a small territory wherein it can be distributed by the natural well pressure; and if subject to be safely transported into other States it necessarily interferes with interstate commerce.

I have hurriedly and briefly stated some of the objections

 Grigsby v. Akin.

to the constitutionality of the law. No good can be accomplished by extending this opinion, and discussing each question involved separately, and supporting the position by authority. I believe the law to be unconstitutional and void for several reasons, and the law being void the complaint was bad, and the demurrer was properly sustained. To uphold the law at all it is necessary to strike out all the Legislature has said in such emphatic terms that no artificial methods can be used in transporting natural gas, or even in keeping up its pressure, and interpolate in lieu thereof an allegation that artificial methods may be used to the extent of three hundred pounds to the square inch in pipes tested to the strength of four hundred pounds to the square inch. In view of the absolute and positive prohibition against the use of any artificial methods expressed in the statute, it seems to me no such intention can be attributed to the Legislature, or such a construction given to the law.

Filed June 20, 1891.

 No. 15,132.

GRIGSBY v. AKIN.

TAXES.—*Invalid Sale of Land to Pay.*—*What Constitutes.*—*Title of Purchaser.*—*Liability for Waste.*—*Void Deed of Remote Grantor.*—*Burden of Proof.*—*Lien for Taxes.*—*How Asserted.*—*Incorrect Description of Land on Tax Duplicate.*—*When Immaterial.*—A. was the owner of the land in controversy, which was part of a larger tract belonging to T. She was taxed with land which she did not own, and paid the taxes, supposing that she was paying the same on the land which, in fact, belonged to her. The land belonging to A. was taxed with the other land to T., and sold in a suit to foreclose a tax lien, the appellant becoming the purchaser thereof. A. was not a party to the suit. After the date for redemption the appellant took a deed, and entered into the possession of the land and cut some timber.

Held, that the decree of foreclosure was, as to A., an absolute nullity, and the sale thereunder did not affect her title to the land in dispute.

128	591
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128	591
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128	591
159	178

Grigsby v. Akin.

Held, also, that the deed executed by the sheriff to the appellant, pursuant to the sale on the decree against T., was no defence to an action by A. for the possession of the land in controversy, nor was it any defence to her action for waste.

Held, also, that the claim of the appellant that one of A.'s grantors, who inherited the land in dispute from her first husband, and conveyed it during her second marriage, had children alive by her first husband at the date of the execution of said deed, thereby vitiating it, must be established by a preponderance of the testimony.

Held, also, that if the appellant desired a lien for taxes on the land in dispute, the burden was upon him to prove that there were taxes due upon that particular piece of said land, and the amount of such taxes.

Held, also, that if A. paid the taxes due from her, it was immaterial whether her land was correctly or incorrectly described on the tax duplicate.

DEED.—Description of Land.—How Construed.—That part of a deed which undertakes to describe the premises conveyed is always construed with great liberality, and a deed is never to be so construed as to render it void, if any other construction can be given it.

From the Sullivan Circuit Court.

G. W. Buff and *J. S. Bays*, for appellant.

J. T. Hays and *H. J. Hays*, for appellee.

COFFEY, C. J.—The complaint in this case consists of three paragraphs. The first is in the ordinary form of an action to recover the possession of real estate; the second is an action to recover for waste, and the third alleges, among other things, that the appellee is the owner in fee of the land therein described, deriving her title thereto by inheritance from her father; that her father, during his life, kept all the taxes and assessments against the same paid, and that since his death the appellee has fully paid all the taxes and assessments against the same each year as they became due; that notwithstanding such facts the auditor of Sullivan county assessed a large amount of taxes against the same, erroneously, in the name of Nancy A. Tilford, who did not pay the same because she did not own said land, and because the appellee was the owner thereof; that the prosecuting attorney of said county instituted an action in the Sullivan

Grigsby v. Akin.

Circuit Court to foreclose said supposed tax lien, making the said Nancy A. Tilford a party thereto, in which action a decree was rendered ordering the sale of said land; that pursuant to said decree the sheriff of said county sold said land and the appellant became the purchaser thereof and received a deed therefor; that the appellee was not a party to said suit and had no knowledge thereof during its pendency.

The appellant filed an answer to this complaint consisting of two paragraphs, and also a cross-bill by which he sought to quiet his title to the land in controversy.

Upon issues formed the cause was tried by a jury who returned a verdict for the appellee to the effect that she was the owner in fee of the land and was entitled to the possession of the same, and assessing her damages at twenty-five dollars.

Upon this verdict the court, over a motion for a new trial, rendered judgment.

The only errors properly assigned in this court are, that the court erred in overruling the demurrer to the second and third paragraphs of the complaint, and in overruling the appellant's motion for a new trial.

No objection to either the second or third paragraph of the complaint is pointed out, and after a careful reading we are of the opinion that they each state a cause of action.

The land in dispute is a tract containing seventeen and one-third acres, being a part of the east half of the southeast quarter of section thirty-four, in township six north, of range ten west, in Sullivan county, and is described by metes and bounds. The entire eighty-acre tract seems to have been taxed to Nancy A. Tilford.

The appellee was taxed with land in section thirty-three which she did not own, and supposing it to be the land in controversy paid the taxes on the same as they became due. Other parties paid taxes on all the land in section thirty-three, so that the taxes paid by the appellee was a double

Grigsby v. Akin.

tax. The prosecuting attorney brought suit against Nancy A. Tilford under the provisions of section 6491, R. S. 1881, to foreclose the tax lien on the eighty-acre tract which includes the land in controversy, obtained a decree, sold the land in pursuance thereof and the appellant became the purchaser. The appellee was not a party to that suit. After the date for redemption the appellant took a deed and entered into the possession of the land and cut some timber.

It is a fundamental principle that a party can not be affected by a proceeding in court to which he was not a party, and in which he had no opportunity of being heard. The decree of foreclosure was, as to the appellee, an absolute nullity, and the sale thereon did not affect her title to the land in dispute. Her title was as perfect after the sale as it was prior thereto, and if she could have maintained an action for its possession against the appellant had he taken possession without the sale, she can maintain such action now. The deed executed by the sheriff of Sullivan county to the appellant pursuant to the sale on the decree against Nancy A. Tilford, was no defence to the appellee's action for the possession of the land in controversy, nor was it any defence to her action for waste.

It is claimed, however, that under the well-established rule that a plaintiff in an action in ejectment must recover on the strength of his own title and not on the weakness of that of his adversary, the evidence in this cause was not sufficient to warrant a recovery by the appellee.

The title of the appellee is perfect, provided the descriptions contained in the conveyances are sufficiently definite; and provided further, that such conveyances are all valid. The description found in some of the conveyances is uncertain, but not to such an extent, we think, as to render them, for that reason, void.

That part of a deed which undertakes to describe the premises conveyed is always construed with great liberality, and a deed is never to be so construed as to render it void,

Grigsby v. Akin.

if any other construction can be given it. *Key v. Ostrander*, 29 Ind. 1; *Gano v. Aldridge*, 27 Ind. 294.

We think the conveyances and decrees in partition read in evidence in this cause, when taken in connection with the other evidence, authorized the jury to find that the appellee was the owner of the land described in her complaint, provided a deed executed by Harriet Wilson to William B. Bowen is to be regarded as a valid conveyance.

Harriet Wilson was the widow of O. P. Wolf from whom she, as such widow, inherited the land now in dispute. She subsequently married John Wilson, and during the second marriage executed the deed above named.

It is claimed by the appellant that at the date of the execution of the deed she had children alive by her former husband, and that her deed to Bowen was, for that reason, void. The deed in question was executed on the 4th day of May, 1866, more than twenty years before the trial of this cause. The testimony as to whether Harriet Wilson had a child by her former husband, living at the time of her second marriage, is conflicting.

The burden was upon the appellant to show such facts as rendered her deed void, and this, we think, he failed to do. We are of the opinion that the evidence in the cause was sufficient to warrant the jury in finding that the appellee was the owner and entitled to the possession of the land in controversy.

It is also contended by the appellant that the court should have ascertained the amount of tax due on the land in controversy, and should have declared the same a lien.

It is sufficient to say, upon this branch of the case, that the land in dispute seems to have been taxed with an entire eighty-acre tract. If the appellant desired a lien for taxes on the particular seventeen acres in dispute here, the burden was on him to prove that there were taxes due upon this tract, and to prove the amount of such taxes. This he did not attempt to do, and, furthermore, the testimony tends to

Barnes v. Sammons et al.

prove that the appellee had paid all the taxes due from her in Sullivan county. If she paid the taxes due from her it was immaterial whether her land was correctly or incorrectly described on the tax duplicate.

Some other objections are urged as to the instructions given, and refused by the court, and to rulings of the court in admitting evidence on the trial of the cause.

We have given these questions a careful consideration, and do not think the court erred in any of the matters of which the appellant complains.

The damages assessed by the jury, however, are excessive. They are assessed at the sum of twenty-five dollars, whereas the highest damages proven were eight dollars.

The evidence in the cause does not make a case for exemplary damages.

If the appellee will remit the sum of seventeen dollars within sixty days from this date, the judgment will be affirmed at her costs; otherwise it is reversed.

Filed June 12, 1891.

No. 15,047.

BARNES v. SAMMONS ET AL.

PRINCIPAL AND SURETY.—*Rights of Surety.—Suit by Owner of Promissory Note.—Surety can not Compel by Proceedings in Equity.*—The surety on a promissory note can not maintain a suit in equity to compel the owner to bring suit upon the note and proceed to collect it, as an adequate remedy at law is afforded by sections 1210 and 1211, R. S. 1881, which provide that the surety, by service of notice on the creditor, can compel him to sue upon the note, and that the creditor's failure to do so will release the surety.

SAME.—*Fraudulent Conveyance by Principal Debtor.—Action to Set Aside.—When Surety can not Maintain.*—A surety upon a note, who has not paid the debt, can not bring a suit to have a fraudulent conveyance of real estate made by the principal debtor set aside, and have the land declared subject to the payment of the debt.

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129 570

Barnes v. Sammons *et al.*

From the Decatur Circuit Court.

J. S. Scobey, for appellant.

J. D. Miller, F. E. Gavin, W. A. Moore, E. P. Ferris, W. W. Spencer and J. S. Ferris, for appellees.

OLDS, J.—The appellant filed his complaint in this action against the appellees, William M. Sammons, Anna Sammons, Mary F. Buckley, Nelson Mowry and Katie Mayer, asking to have certain conveyances of real estate set aside and subjected to the payment of certain notes, and to compel the holders of the notes to proceed to collect the same, or that the appellant be released as surety thereon.

The appellees demurred to the complaint for want of facts, which was sustained, exceptions were reserved, and judgment rendered on demurrer.

The ruling on the demurrer is assigned as error, and presents the only question in the case.

Two questions are presented by this ruling:

First. Can a surety upon a note, without having paid the debt, bring a suit to have a fraudulent conveyance of real estate made by the principal debtor set aside, and have the land declared subject to the payment of the debt?

Second. Can a surety on a promissory note maintain a suit in equity to compel the owner to bring suit upon the note and proceed to collect it?

As to the last question it must be answered in the negative.

It is a well-settled rule that equity will not intervene and afford relief when the party has a full and adequate remedy at law.

Sections 1210 and 1211, R. S. 1881, afford the surety an adequate remedy. By service of notice on the creditor he can compel him to bring suit on the note, and his failure to do so will release the surety. This is as adequate and complete a remedy as is afforded by proceedings in equity, hence

Barnes v. Sammons et al.

a proceeding in equity will not lie for this purpose. It then remains to determine the first question.

Courts of chancery originally took jurisdiction to set aside a fraudulent conveyance after the creditor had obtained his judgment at law, but since our courts of law and equity are blended, and the one court has jurisdiction of actions at law and suits in equity, and grants both equal and equitable relief, the rule has been so modified in this State that the creditor may join the action for judgment on his claim with his suit to set aside a fraudulent conveyance made by the debtor, and in the same action recover both a judgment on his claim and a decree setting aside the fraudulent conveyance and subjecting the land to the payment of his judgment. *Field v. Holzman*, 93 Ind. 205.

This is the very limit to which we think the rule has been carried in this State, and farther than it has been carried in many others.

The surety may pay the debt and then bring his action and be subrogated to the rights of the original creditor, and bring his action for judgment on his claim and to set aside a fraudulent conveyance.

But, until the surety has been compelled to pay or has sustained some loss, he has no right of action. He has no lien upon the land of his principal. His cause of action has not accrued, and he has no right to a judgment or lien upon the land of the debtor until he has paid the debt; then he has a claim against his principal which he has the right to have satisfied out of the property of the principal. Until then he has no right of action either in law or equity.

Originally, it was necessary for the creditor to allege and prove that he had taken the necessary proceedings at law, viz., that he had recovered a judgment upon his claim before a court of equity would interfere and afford relief. Pom. Eq. Jur., section 1415. But, as we have before stated, this rule has been so far modified that he may join his action for judgment upon his claim and for equitable relief; but we

Barnes v. Sammons et al.

are not aware that any court has held that, in the absence of a statute authorizing it, he may maintain his suit in equity to set aside the fraudulent conveyance without either first having obtained his judgment at law, or sought a judgment in the same action. The creditor must at least take steps to obtain his judgment at the same time he seeks equitable relief. This the surety can not do until he has paid the judgment.

It is true, the surety is a creditor from the time he executes the note, in the sense that he assumes the liability from that date, and is affected by any fraudulent conveyance made by the debtor of his property thereafter; and being detrimental to the interest of the surety, should he pay the debt, he may prosecute his suit in equity to have such fraudulent conveyance set aside. It is possible that the surety, after he has served a notice on the creditor requiring him to bring suit upon the note, and the creditor has brought suit upon the note, and there has been a finding and proper judgment rendered in favor of the creditor and surety requiring that the property of the principal debtor be first exhausted for the payment of the debt, may then maintain an action to set aside the fraudulent conveyance made by the principal debtor; and the property so conveyed may be levied upon. If the claim be thus reduced to judgment the rights of the parties are fixed, and no further adjudication need be had; but the surety can not institute a suit to set aside a fraudulent conveyance without first having obtained a judgment in his favor as surety, or, having paid the debt, seeks, in the same proceeding, to have judgment on his claim, as well as a decree setting aside the conveyance. The original creditor can not maintain a suit to set aside a fraudulent conveyance without having first obtained a judgment, or by seeking a judgment in the same proceeding; and certainly the surety possesses no rights superior to the creditor in this respect. This right of the surety is spoken of by law writers as a right of subrogation

Hoffman v. Harvey.

to the right of the creditor. Until a judgment establishing his suretyship has been rendered, or he has paid the debt, he has no rights which he can enforce against the principal. Brandt Suretyship and Guaranty, section 195; Bump Fraudulent Conveyances (3d ed.), pp. 507, and 508; Wait Fraudulent Conveyances, etc., sec. 111. See "Fraudulent Conveyances," 8 Am. & Eng. Encyc. of Law, and authorities there cited.

The conclusion we have reached leads to an affirmance of the judgment.

Judgment affirmed, with costs.

MILLER, J., took no part in the decision of this cause.

Filed May 26, 1891; petition for a rehearing overruled Sept. 17, 1891.

No. 15,061.

HOFFMAN v. HARVEY.

From the Porter Circuit Court.

L. T. Michener, Attorney General, *J. E. McDonald*, *J. M. Butler*, *A. H. Snow* and *C. N. Morton*, for appellant.

W. Johnston and *J. S. Stick*, for appellee.

OLDS, J.—The sole question presented by this appeal is the constitutionality of an act of the Legislature entitled, "An act for the protection of the public health by promoting the growth and sale of healthy cattle and sheep, making it a misdemeanor to sell the same without inspection before slaughtering within this State, and to authorize cities to appoint inspectors." Acts of 1889, p. 150 (Elliott's Supp., section 359).

The appellee was prosecuted before a justice of the peace for a violation of the law and fined and committed to jail. He then filed his petition in the court below for a writ of *habeas corpus*, and was released, the court holding the law unconstitutional. The appellant is the sheriff of Porter county.

This same law has been held unconstitutional by this court in the case of *State v. Klein*, 126 Ind. 68, on the authority of the case of *Minnesota v. Barber*, 136 U. S. 313, involving the validity of a statute of Minnesota. On the authority of these cases the judgment in this case is affirmed.

Filed June 13, 1891.

INDEX.

ABATEMENT.

See BASTARDY, 3.

1. *Plea in.—Former Action.—Non-Payment of Costs in.—Practice.*—It is a matter in the sound discretion of the court, as to whether or not it will stay proceedings upon the filing of a plea in abatement alleging that the plaintiffs had formerly commenced an action upon the identical supposed cause of action set up in the complaint in the second action, and had dismissed the same, and that the defendants had recovered a judgment in said original action for costs which had not been paid. *Cashman v. Brownlee*, 266
2. *Plea of.—Purchase Price of Real Estate.—Action to Recover.—Insufficiency of Plea.*—In an action to recover the agreed purchase price of a tract of land conveyed by the plaintiff to the defendant, a plea in abatement is bad, which alleges that at the time the plaintiff conveyed the real estate to the defendant she had no legal title to the same, but that the legal title was in another, and that an action was pending against the defendant upon his warranty, he having conveyed the land, but which does not show that either the defendant or his grantees have been disturbed or interrupted in their possession. *Parker v. Culbertson*, 319

ABORTION.

See CRIMINAL LAW, 3 to 6, 8.

ACTION.

See MALPRACTICE.

ADMINISTRATOR'S SALE.

See DECEDENTS' ESTATES, 4, 6, 11 to 14.

AFFIDAVITS.

See NEW TRIAL, 2.

ALIMONY.

See DIVORCE, 2, 3.

ALLUVION.

See EASEMENT, 7.

AMENDMENT OF PLEADING.

See PRACTICE, 14.

APPEAL.

See DRAINAGE, 1, 4, 11, 12; INJUNCTION, 1; JUDGMENT; PRACTICE, 10 to 12, 14, 20, 21; SUPREME COURT, 1.

1. *Acceptance of Money Due on Judgment.—Assignment of Errors.—Plea to.*—The acceptance of the money awarded by a judgment precludes the prosecution of an appeal. A verified plea to an assignment of errors alleging such an acceptance is a good plea. *Newman v. Kiser*, 258
2. *Same.—Assignment of Errors.—Plea in Bar and Abatement to.—Practice.*—The practice of answering the assignment of errors by a plea in bar, or in abatement, where there is matter in bar or abatement which occurs

after the rendition of the judgment, is generally appropriate and proper, for assignments of error may be met by pleas, answers, demurrers or motions. *Id.*

3. *Same.—Attorney's Acts.—When Client Bound Thereby.—Money Paid on Judgment.—Right of Attorney to Receive.*—Where one of the appellants did not directly contract with the attorney who received the money paid in on the judgment, but his co-appellant did, and such attorney was fully recognized by the non-employing appellant as his representative throughout the entire proceedings, it is too late to repudiate the representative's act after action has been taken upon it by the court, or by adverse parties. An attorney has authority to receive money paid to the clerk upon a judgment rendered in favor of his client. *Id.*

APPLICATION.

See INSURANCE, 2, 3.

APPOINTMENT.

See OFFICE AND OFFICER, 1 to 3.

APPROPRIATION OF LAND.

See RAILROAD, 1, 2.

ARREST OF JUDGMENT.

See NEW TRIAL, 3.

ASSAULT AND BATTERY.

See CRIMINAL LAW, 1.

ASSESSMENT.

See DRAINAGE, 1, 2, 12; STREET IMPROVEMENT; STREET RAILWAY, 6; TAXES, 5 to 13.

ASSESSMENT OF DAMAGES.

See PRACTICE, 3.

ASSIGNMENT OF ERRORS.

See APPEAL, 1, 2; PRACTICE, 16.

ATTORNEY AND CLIENT.

See APPEAL, 3.

1. *Privileged Communications.*—Communications made by an agent of the client to his attorney concerning the client's business are not privileged communications as between the agent and the attorney, and, with the client's consent, the attorney may testify to them.

Bingham v. Walk, 164

2. *Profit Made by Attorney.—Must Account to Client.*—Where an attorney was employed to enforce and collect a judgment and decree against specific lands, and proceeded so far in his employment as to procure a sale of the land, and had his client, under his advice, purchase it for the benefit of the estate represented by him, and thereafter, while he was yet such attorney, he purchased an outstanding title, under an express agreement that he would hold it in trust for the estate represented by his client, and subsequently sold the land at a great advance, he must be held as a trustee for his client. He must account for all the profits made in the transaction after deducting the amount he was to pay for the title and his reasonable attorney's fees.

Hughes v. Willson, 491

BANKS AND BANKING.

1. *Bank Stock.—Taxation of.—Assessment in Name of Bank.—Effect of.—Excessive Assessment.—Remedy.*—Where bank stock is assessed and a

valuation put upon it by the proper officer, and an entry made of the assessment upon the tax duplicate, the fact that the assessment was made in the name of the bank, instead of the individual stockholders, will not invalidate the lien, or relieve the respective stockholders from the payment of the tax for which it is liable. If the parties were aggrieved on account of being assessed with a greater amount than should have been charged against them, they had a remedy by appearing before the city board of equalization.

Small v. City of Lawrenceburgh, 231

2. *Bank of Discount and Deposit.—Presumption as to—*As we have only one general statute providing for the organization of banks of discount and deposit, the presumption is, that a bank of discount and deposit was organized under that statute. The presumption is a rebuttable one, but such a presumption makes a *prima facie* case.

Brighton v. White, 320

3. *Same.—Transfers by Insolvent Bank.—Nullity of.—Preference of Creditors.—*Assignments or transfers of evidences of indebtedness by an insolvent bank, with a view to preferring one creditor to another, are utterly null and void. Section 2697, R. S. 1881. A creditor taking an assignment in violation of the terms of the statute gets no shadow of title. *Blair v. Hanna, 87 Ind. 298, distinguished. Ib.*

BASTARDY.

1. *Inspection of Child.—Instruction to Jury.—New Trial.—*A new trial should not be granted in a bastardy proceeding because of alleged misconduct of the jury in inspecting the features of the child during a recess in the trial of the cause, where they were instructed that they had no right, in passing upon the question of paternity, to take into consideration the countenance of the child, or to inspect it, but that they must consider only the oral testimony. *La Matt v. State, ex rel., 123*
2. *Same.—Evidence.—Cross-Examination.—*Where the relatrix, in a bastardy proceeding, testifies on cross-examination by the defence to an act of intercourse other than that resulting in pregnancy, the State may be permitted to call a witness to corroborate her testimony. *Ib.*
3. *Still-born Child.—Institution of Suit Before Birth.—Rendition of Judgment After Death.—*Where a prosecution for bastardy is commenced before the birth of the child, the law recognizes the existence of the child sufficiently to authorize the prosecution, and its subsequent death, whether *in utero* or after birth, will not abate the action. Section 997, R. S. 1881. The court is authorized in such a case to give judgment for such sum as shall be deemed just, and the judgment may be rendered after the death of the child. *Canfield v. State, ex rel., 56 Ind. 168, distinguished. Robinson v. State, ex rel., 397*

BILL OF EXCEPTIONS.

See COSTS, 1, 2; PRACTICE, 9, 18, 19, 23.

*How Evidence Made Part of.—Stenographer's Report—*A bill of exceptions incorporating the evidence is always essential, as the evidence must come to the appellate tribunal under the sanction of the trial judge. Evidence can not be brought into a bill of exceptions by reference to a stenographer's report, but the report itself may be incorporated.

Dick v. Mullins, 365

BOARD OF EQUALIZATION.

See TAXES, 4, 5, 8.

BONA FIDE PURCHASER.

See LIEN, 2; LIS PENDENS; VENDOR AND PURCHASER.

BONDS.

See GRAVEL ROAD, 5.

BRIDGES.

1. *Bridge Over Boundary Stream.—Cost of Construction, or Repairing.—Consent.*—One county can not purchase or construct a bridge over a stream forming the boundary line between it and an adjoining county, and compel such adjoining county to pay its proportionate part of the expense; nor can it compel such adjoining county to pay its proportionate part of the cost of repairing such a bridge. Such adjoining county, to be liable, must consent to such purchase, or erection, and mere silence, when the first county serves notice of its intention to purchase, or build, such a bridge, is not such a consent as will render such adjoining county liable to pay a proportionate share of the cost. *Board, etc., v. Board, etc., 295*
2. *Same.—A County May Build a Bridge Over its Boundary Line.*—A county may purchase, or build at its own expense, a bridge over a stream between it and an adjoining county; which bridge, when so purchased or built, will belong to the county buying, or building it. *Ib.*

CARRIER AND PASSENGER.

See COMMON CARRIER; RAILROAD, 10, 11.

CASES DISTINGUISHED.

- Blair v. Hanna*, 87 Ind. 298, distinguished. *Brighton v. White*, 320
Summers v. Tarney, 123 Ind. 560, distinguished. *Hormann v. Hartmetz*, 353
Canfield v. State, ex rel., 56 Ind. 168, distinguished. *Robinson v. Sate, ex rel.*, 397
State, ex rel., v. Indiana, etc., Co., 120 Ind. 575, distinguished. *Jamieson v. Indiana, etc., Co.*, 555

CHANGE OF VENUE.

See DECEDENTS' ESTATES, 17.

CHARTER.

See STREET RAILWAY, 1 to 5.

CHATTEL MORTGAGE.

See PARTNERSHIP.

1. *Foreclosure.—Failure to Object to Form of Judgment.*—In an action to foreclose a chattel mortgage, where the notes secured waive valuation laws, but the mortgage does not, and the judgment is that the mortgage be foreclosed and the property sold according to law, to pay and satisfy the indebtedness, the judgment will not be reversed, there being no objection to its form, on the ground that the judgment is for the sale of the mortgaged property without relief. *Mansfield v. Shipp*, 55
2. *Recording.*—As between the mortgagor and the mortgagee or the latter's assignee, it is not necessary to record a chattel mortgage. As between them it is valid without recording. *Reynolds v. Quick*, 316
3. *Same.—Receiver.*—If a petition to foreclose a chattel mortgage shows that the mortgagor is insolvent, that the mortgaged property is not sufficient in value to secure the debt, and that there is danger of its removal beyond the jurisdiction of the court, it is sufficient to authorize the appointment of a receiver of such property. *Ib.*
4. *Fraud in Making Sale.—Liability of Mortgagor for Value of Property.—Release of Sureties.*—If the mortgagee of a chattel mortgage sell the property mortgaged under a power authorizing the sale, becoming

the purchaser of it himself at an amount far below the value of the mortgaged property, but fails to give the requisite notice of the sale, and by misstatements and falsehoods prevents a fair competition at such sale, thereby being able to secure it at a price far below its value, the sale is merely a colorable one, wholly insufficient to bar the mortgagor's equity of redemption. The mortgagee will be held to account to the mortgagor or his sureties for the fair value of such property at the time of its appropriation; and if its value exceeded the debt, the debt is paid and the sureties released.

Nichols, Shepard & Co. v. Burch, 324

COLLATERAL ATTACK.

See CORPORATION; DRAINAGE, 5 to 7; PARTITION, 1.

COMMON CARRIER.

1. *Falsely Charging Passenger Concerning Payment of His Fare.—Misconduct of Passenger in Heat of Passion.—Ejecting.*—A railroad company can not justify the act of its conductor in expelling a passenger, who has paid his fare, on account of his having, in the heat of passion, when he was falsely charged with the failure to pay, used improper language, such as swearing in the presence of female and other passengers in a loud tone of voice. *Louisville, etc., R. W. Co. v. Wolfe, 347*
2. *Same.—Ejecting Passenger.—Damages Occasioned by Passenger Resisting.*—A passenger lawfully in a car, who is illegally and wrongfully ejected, may recover for the damages occasioned to his person by his making a reasonable resistance to prevent his removal. *Ib.*

CONDITION SUBSEQUENT.

See DEED, 2 to 4.

CONSIDERATION.

See DEED, 5; PROMISSORY NOTE.

CONSOLIDATION.

See RAILROAD, 8.

CONSTITUTIONAL LAW.

See NATURAL GAS.

1. *Tie Vote.—Constitutionality of Section 4736, R. S. 1881.*—Section 4736, R. S. 1881, which provides that where an election results in a tie vote for opposing candidates, the judges of election shall determine by lot the person entitled to the office, is not in conflict with the constitutional provision that all elections shall be by ballot (Const., Art. 2, section 13), and is valid. *Johnston v. State, ex rel., 16*
2. *Same.—Mandamus.*—Where the judges of election, after certifying the result as a tie vote, adjourn without determining by lot the person entitled to the office, they may be compelled by mandate to re-assemble and take the action required by law. *Ib.*
3. *Same.—Relator.—Estoppel.*—The relator is not estopped to successfully urge his claim to the office by requesting the election officers not to determine the result of the election. *Ib.*
4. *Uniformity of Statute.—Local or Special Legislation.*—A statute which is of general and uniform operation throughout the State, and operates alike upon all persons, under the same circumstances, is not subject to the objection that it is special or local legislation. *Gilson v. Board, etc., 65*
5. *Same.—Uniformity in Taxing District.*—If a tax law provides that the rate of assessment and taxation shall be uniform and equal throughout the locality in which the tax is to be levied, it does not violate

the section of the Constitution requiring that a tax law shall provide for a uniform and equal rate of assessment and taxation. *Ib.*

6. *Police Power.—Needful Regulations.—Legislature.*—Where a subject is within the police power of the State, the question as to what regulations are proper and needful is one for legislative consideration and decision. *Jamieson v. Indiana, etc., Co., 555*
7. *Same.—Legislature.—Usurpation of Power.—Presumption.*—Courts will not presume that the Legislature has usurped power or disregarded the organic law. A party who asserts that the Legislature has usurped power or has violated the Constitution must affirmatively and clearly establish his position. *Ib.*

CONTEST OF ELECTION.

See ELECTIONS, 1.

CONTRACT.

See PARTIES; STATUTE OF FRAUDS.

1. *Rescission.—Waiver.*—One who, uninfluenced by the fraud, deals with the property as his own, after having fully discovered that fraud has been practiced upon him in the contract or transaction by or through which he acquired the property, thereby waives his right to rescind. *Tarkington v. Purvis, 182*
2. *Same.—Acts not Amounting to Waiver of Right to Rescind.*—Equivocal acts, however, which do not clearly evince a purpose, with complete knowledge of the fraud, to retain the property as his own, will not defeat the right of the person defrauded to rescind. The act must be unequivocal, and must show an election to retain the property after discovering the deceit before the right to rescind is gone. *Ib.*
3. *Same.—Purchaser of Partnership Interest.—Fraud.*—Where the purchaser of an interest in a partnership seeks to rescind the contract because of the vendor's misrepresentations, and has fully perfected his right to claim a rescission by tendering back everything that had been received, and by offering to place the fraudulent vendor *in statu quo*, the fact that such purchaser afterwards received money arising from the sale of some of the assets of the firm does not affect his right to compel the rescission, if the property was sold in the course of the firm's business, and the money received was fully accounted for without loss to the vendor. *Ib.*
4. *Same.—Assignment of Firm Assets.—Repudiation of.*—The purchaser of an interest in a partnership who offers to rescind because of the fraud practiced upon him by the partner, does not lose his right of rescission by afterwards joining the other partners in a deed of voluntary assignment of the firm assets, where after the deed was signed and acknowledged, but before it was delivered or recorded, he repudiates the assignment, and does not consent to the delivery of the deed. *Ib.*
5. *Statute of Frauds.—Correspondence.*—If a contract which comes within the statute of frauds can be extracted from correspondence between the parties upon the subject of the contract, the statute is satisfied. *Austin v. Davis, 472*
6. *Same.—Agreement to Make Child an Heir.—Transfer of Property.—Trust.—Married Woman.—Void Contract.—Ratification.—Statute of Frauds.—Part Performance.*—Where a childless husband and wife, in consideration that a young girl should be surrendered to them, agreed to take her as their own child, provide for her and bring her up as their own, and at their death leave her all their property, and the husband afterwards adopted the child, to which the wife assented, *Held*, that the husband was not restrained by the contract in the en-

joyment of his property, and that he could dispose of it as he pleased during his life, by gift or otherwise.

Held, also, that a conveyance in good faith in his lifetime of all his property to his wife vested in her an absolute title to the property, it not being charged with any trust in favor of the girl.

Held, also, that the contract was void as to the wife, because of her coverture when it was entered into, and incapable of ratification.

Held, also, that a new verbal contract made by the wife after the death of the husband was within the statute of frauds, and a part performance on the part of the girl did not take it out of the statute. *Ib.*

CONTRIBUTION.

See DECEDENTS' ESTATES, 2.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE; RAILROAD, 3, 7, 12, 13.

CONVEYANCE.

See TRUST AND TRUSTEE.

CORPORATE STOCK.

See DECEDENTS' ESTATES, 10, 11, 14 to 16.

CORPORATION.

Existence of.—Attacked by Direct Proceeding.—When Must be.—Where there is a statute authorizing the creation of a corporation and an attempt to comply with the statute, and an actual exercise of corporate functions, the existence of the corporation can only be destroyed by a direct proceeding. *Crowder v. Town of Sullivan, 486*

COSTS.

See DRAINAGE, 11; ELECTIONS, 3.

1. *Relaxing of.—When Motion May be Made.—Bill of Exceptions.*—A motion to modify the judgment and retax the costs in a case may be made at any time during the term when the judgment was rendered, as during that entire term the proceedings are *in fieri*. It is not necessary that the motion should be extended on the order-book. It is sufficient if it is brought into the record by the bill of exceptions.

Merrill v. Shirk, 503

2. *Same.—Bill of Exceptions.—What it Must Contain.*—The law does not necessarily contemplate a trial and the introduction of evidence on the hearing of a motion of this character. A bill of exceptions is sufficient which contains the verified motion to modify the judgment and retax the costs, together with an itemized and a properly certified statement of the costs, and which recites that "all the evidence introduced upon said hearing or heard by the court was the complaint, answer and reply, the verdict of the jury and the judgment of the court in said cause, together with the verified motion and exhibit above referred to." *Ib.*

3. *Same.—Action to Quiet Title.—Joinder of with Action for Partition.—Taxation of Costs.—Discretion of Court.*—Where an action to quiet title is joined with an action for partition, the taxation of costs is governed by section 590, R. S. 1881, and the successful party is entitled to recover his costs, and the court has no discretion to refuse it. The verdict and judgment are conclusive against the unsuccessful party. *Ib.*

COUNTY.

See BRIDGES.

COUNTY AUDITOR.

See TAXES, 9, 10.

COUNTY COMMISSIONERS.

See ELECTIONS, 1.

Erection of Court-House.—Minor Changes Without Plans or Specifications.—Power of Commissioners to Make.—Presumptions.—Under section 4243, R. S. 1881, requiring plans and specifications for the construction of public buildings to be prepared and filed before advertising for proposals, a board of county commissioners may make a change in a matter of detail, such as the heating or lighting of a court-house, in process of erection, without requiring plans and specifications of the proposed change to be filed, and without advertising for proposals for the same. No important general change in the plan of the building can be thus made, only changes in matters of detail. It must be presumed that the board of commissioners neither violated the law, nor acted in bad faith in ordering changes in a matter of detail, and in the absence of countervailing facts, it must be also presumed that the changes were of such minor importance and so necessary that it was not only the right of the board to order them made, but that it was its duty to cause them to be made.

Board, etc., v. Cincinnati, etc., Co., 240

COVENANT.

1. *Running with Land.—What is.*—A covenant in a deed of certain premises, "together with the mill and all privileges and easements thereto belonging," is a covenant running with the land that the grantors had a right to maintain the dam at the height it was when the deed was made. *Scott v. Steller, 385*
2. *Same.—Action for Broken Covenant.—Subsequent Grantee.—When can not Maintain.*—In a suit by a subsequent grantee against the grantors in the above deed based upon the breaking of said covenant, the grantors may successfully defend by showing that they sold the land with the agreement that the grantees, among other things, were to repair or rebuild the old dam, and that it should not be raised beyond its original height; that for the purpose of deceiving their grantors the grantees destroyed the marks indicating the height of the dam, and falsely represented that the height was not increased, and that therefore the grantors executed the deed in ignorance of the fact that the height of the dam had been increased. *Id.*

CRIMINAL LAW.

1. *Assault and Battery with Intent to Kill.—Information.*—An information charging that one A., at, etc., on, etc., "did then and there unlawfully, feloniously, wilfully, and purposely, and with premeditated malice, in a rude, insolent, and angry manner, touch one B., with intent then and there, and thereby, her, the said B., feloniously, wilfully, and purposely, and with premeditated malice, to kill and murder," etc., contains a good charge of assault and battery, with intent to commit the crime of murder. *Vaughan v. State, 14*
2. *Larceny.—Information.—Duplicity.*—An information charging in one count the larceny of two distinct articles of personal property belonging to different persons, without alleging that the property of the two owners was stolen at the same time and by the same act, is bad for duplicity. *Joslyn v. State, 160*
3. *Abortion.—Sufficiency of Indictment.*—An indictment for criminal abortion charging that an instrument was feloniously introduced into the womb of a pregnant woman, with the intent to produce a miscarriage, such operation not being necessary to save the woman's life, is sufficient without showing what kind of a wound it produced or what disease it caused. *Rhodes v. State, 189*

4. *Same.—Indictment.*—The indictment was not bad because it showed both miscarriage and death. *Ib.*
5. *Same.—Duplicity.—Charging Accessory.*—The indictment was not bad for duplicity because it charged an accessory before the fact as principal. *Ib.*
6. *Same.—Evidence.—Declarations in Last Illness.*—Declarations and exclamations indicative of pain or suffering, made by the woman in her last illness, and not referring to the past, are competent evidence. *Ib.*
7. *Same.—Witness.—Impeachment.*—Where the State is neither surprised nor prejudiced by the testimony of a witness called by it, it may not contradict such witness by evidence of contradictory statements made out of court. *Ib.*
8. *Same.—Evidence.*—It was not competent for the State to show that the woman, upon whom the abortion was produced, was buried at the expense of the county. *Ib.*
9. *Same.—Instruction.—Reasonable Doubt.*—In a case where the evidence of guilt is purely circumstantial an instruction that "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty," is erroneous. *Ib.*

CUSTODY OF CHILD.

See DIVORCE, 1, 4.

DAMAGES.

See COMMON CARRIER.

When Exemplary May be Given.—Exemplary damages may be given when malice and oppression weigh in the controversy, and the act is not punishable as a crime. *Louisville, etc., R. W. Co. v. Wolfe, 347*

DECEDENTS' ESTATES.

1. *Extent of Creditor's Lien on Realty.*—A creditor of an estate has a lien for his claim on the entire realty of the estate, and can not be confined to a particular part of it. *Chaplin v. Sullivan, 50*
2. *Insufficiency of Personal Assets.—Payment of Indebtedness by Purchase of Part of Real Estate.—Right of Contribution.*—A purchaser of land set off to one of the children of a decedent in a partition proceeding, who, in order to prevent the land so purchased by him from being sold to discharge outstanding claims against the estate, pays off such indebtedness, the executor not having any assets with which to do so, is entitled to contribution from one who has also purchased a portion of said estate, but who refuses to pay his proportion of said indebtedness. *Falley v. Gribbling, 110*
3. *Same.—Expenses of Administration.—Real Estate of Decedent Liable for.*—Under our statute, the land of a decedent is subject to be sold by an executor or administrator to make assets with which to pay the expenses of administration. *Ib.*
4. *Same.—Statute of Limitations.—Application to Sell Land to Pay Debts.—When Must be Filed.*—The fifteen years' statute of limitations applies to applications of an executor or administrator to sell lands for the purpose of making assets with which to discharge the liabilities of the estate represented by him. The statute does not begin to run, however, until the executor or administrator discovers the insufficiency of the personal estate, and that it is necessary to sell land to make assets to pay off such liabilities. *Ib.*

5. *Same.—Statute of Limitations.—Defence of.—How Pleaded.—Demurrer.—Complaint.*—In an action by an executor to sell land of a decedent for the purpose of discharging liabilities against his estate, a demurrer will not lie to the complaint on the ground that the action is barred by the statute of limitations, unless the complaint affirmatively shows that such is the fact. The statute of limitations must be pleaded, and is not available on demurrer unless it affirmatively appears that the case is not within any of the exceptions to the statute. *Ib.*
6. *Sale of Land by Administrator.—Mortgagee not Party to Proceeding.—Lien not Divested.*—To divest the lien of a mortgage by an administrator's sale of land, the mortgagee must be made a party to the proceeding, and the court must order the sale of the land to discharge the lien. Where the mortgagee was not a party to the proceeding to sell, and the court did not order a sale to pay his mortgage, the lien of the mortgage was not divested, and the purchaser took the land subject to such lien, notwithstanding the administrator's assurance to the contrary. *Crum v. Meeks, 360*
7. *Same.—Final Settlement.—When May be Set Aside.—Summons.*—Under section 2403, R. S. 1881, any person interested in an estate which has been finally settled, if he was not personally served with summons, and did not appear at the hearing of such final settlement, may have the same set aside if it affects him adversely, for any of the causes therein specified. *Ib.*
8. *Same.—Final Settlement.—Action by Creditor to Set Aside.—Estoppel.*—When a creditor of a decedent seeks to set aside the final settlement of the administrator, on the ground that the administrator misappropriated the funds arising from the sale of certain real estate, he is not estopped from so doing because formerly he had brought a suit, in which he was defeated, to set aside the sale of the land, alleging as a reason therefor that the land sold too cheap. Neither is he estopped because he failed to object to certain acts and declarations of the administrator, it not appearing that he knew his rights, or that his failure to object in any degree influenced the conduct of the administrator, or that the administrator did not know all the facts as fully as he did. *Ib.*
9. *Childless Second Wife.—Interest in Husband's Realty.—Rights of Children.*—Under the statute previous to the amendment of 1889 a childless second wife takes a fee simple title in one-third of the real estate of which her husband died seized. At her death the children of the husband by a former marriage become her forced heirs, and the quitclaim deeds of such children do not estop them from recovering the land after the death of the widow. The said deeds only pass the title held by the grantors at the time of the conveyances. *Montgomery v. McCumber, 374*
10. *Corporate Stock.—Personal Property.*—Shares of stock in a corporation, owned by the decedent at the time of his death, are personal property. *Citizens' Street R. W. Co. v. Robbins, 449*
11. *Same.—Sale*—Such stock descends to the heirs at law, subject to the right of the administrator to subject the same to sale in the manner prescribed by the laws of the State. *Ib.*
12. *Same.—Public and Private Sales.*—The common law right of the administrator to sell and dispose of personal property does not exist in this State. Sales of such property must be made in the manner prescribed by our statutes upon the subject. In the absence of an order from the proper court, the sale must be public, and where the

sale is private, under the order of the court, it must be made in substantial compliance with the order. *Ib.*

13. *Same.—Sales Under Order of Court.—When Title Passes.*—In cases of private sales, where the order of the court does not require a confirmation, if the sale is made in substantial compliance with the order of the court the title passes to the purchaser upon his compliance with the terms of the sale. *Ib.*
14. *Same.—Validity.*—Where an order to sell stock at private sale required the administratrix to make the sale on good security, and the sale was made upon the individual note of the purchaser without any security and on a credit of ten years, the statute authorizing a credit of only twelve months, the sale was void and vested no title. *Ib.*
15. *Same.—Corporate Stock.—Transfer of on Books of Corporation.—Liability for Illegal Transfer.*—In such case, if the corporation, with notice that the stock belonged to the estate of the decedent, and with notice of the order of sale, cancels the certificates of stock, and issues a new certificate to the purchaser, without inquiring into the validity of the sale, it is liable to the estate for any loss occasioned thereby. It is bound to know that the sale has been made in compliance with the terms of the order. *Ib.*
16. *Same.—Liability of Corporation to Estate.*—A purchaser of such new certificate, in good faith, and without notice of any illegality in the surrender and cancellation of the original stock, is not liable to the estate, its remedy being against the corporation. *Ib.*
17. *Application to Remove Administrator.—Change of Venue.*—In an application to remove an administrator the party making the application is not entitled to a change of venue from the county, nor is he entitled to a change from the judge. *Bowen v. Stewart, 507*
18. *Same.—Appointment of Administrator.—Power of Court—Adverse Party.*—Where more than twenty days had elapsed after the death of a decedent, and neither the widow nor any of the children had taken out letters of administration, it was proper for the court to appoint the treasurer of Carroll county, the decedent being a resident of said county at the time of his death, administrator of the estate of said decedent, it being claimed that at the time of his death the decedent held mortgages on large bodies of land in Carroll county and in adjoining counties which were unpaid, and that he was indebted to the city of Delphi and the county of Carroll in a large sum for taxes due on personal property which had never been listed for taxation. The treasurer of the county, under the circumstances, was not a stranger to the estate, and therefore incompetent to take out letters. Neither did he have such an adverse interest as against the estate as to render him an improper person to administer upon the same. *Ib.*
19. *Same.—Evidence.—Competency of to Prove Need of Administration.*—Upon the hearing of the application to remove the administrator, it was proper for him to show that there were unsatisfied mortgages upon real estate in Carroll county, held by the decedent in his lifetime. It was a circumstantial fact, which the court might consider in determining as to the necessity for an administration of the estate. *Ib.*
20. *Same.—Evidence.—Communication of Decedent.—Inadmissibility of.—Custom as to Appointment of Administrators.—Incompetent to Show.*—Upon such a hearing the court did not err in excluding testimony as to the wish of the decedent, communicated to his son, that his estate should not be administered upon. Neither did it err in excluding testimony as to the custom of the Carroll Circuit Court in the appointment of administrators. *Ib.*
21. *Same.—Settlement of Estate by Heirs without Administration.—When can*

not be Done.—The heirs of a decedent can not by agreement among themselves to settle an estate without administration where there are creditors, deprive such creditors of the right to take letters, or to procure others to take them. Letters having once been properly granted, the person to whom such grant is made acquires the right to fully administer the estate. *Ib.*

22. *Same.*—*Appointment of Administrator.*—*Presumption as to.*—*Assailing Appointment.*—*Burden of Proof.*—Where the court has granted letters of administration, the legal presumption exists that the action of the court was right, and the burden is upon those assailing the right of appointment to prove that there was no necessity for administration. *Ib.*

DEDICATION.

See EASEMENT, 6.

DEED.

1. *Warranty.*—*Estoppel.*—*Subsequently Acquired Title.*—Any subsequently acquired title by a grantor in a warranty deed to the premises conveyed by him inures to the benefit of the grantee, and such grantor is estopped to claim title thereto. *Neely v. Boyce, 1*
 2. *Condition Subsequent.*—*Sufficiency to Defeat Estate.*—*Aiding.*—A condition subsequent that will defeat an estate created by a deed must be fairly expressed in the deed itself. The words used must create the condition. The court will not supply it, if the parties fail to express it. *Sumner v. Darnell, 38*
 3. *Same.*—*Condition must be Clearly Stated.*—A condition may be created by any words which show clear, unmistakable, intention on the part of a grantor to create an estate, or condition, regard being had to the whole of the deed in which they occur. The word "condition" need not be used, but words importing a condition must be used, or plainly inferred from the instrument and the existing facts. *Ib.*
 4. *Same.*—*County Seat.*—*Removal.*—*Reversion of Land Conveyed to Secure Location of.*—In 1816 the Legislature moved the county-seat of Wayne county from Salisbury to Centreville, where it remained until 1874, when it was removed to Richmond. In 1819 the owner of certain land situated in Centreville, in consideration of the seat of justice having been permanently established in Centreville, and for no other consideration, conveyed it to A, B, and C, by name, the commissioners of the county, "and their successors in office, for the use of said county."
- Held*, that this was, in effect, a conveyance to the county, and not to them as trustees for the county; that the grantor had received a sufficient consideration for the conveyance from the presumed benefit he derived from the location of the county-seat at Centreville from 1819 to 1874, and that the land conveyed did not revert to the grantor or his heirs when the county-seat was removed to Richmond. *Ib.*
5. *Parol Evidence to Show Consideration.*—Where the consideration of a deed is stated in general terms, as for love and affection, the true consideration may be shown by parol evidence in an action to set aside the conveyance as fraudulent. *Nichols, Shepard & Co. v. Burch, 324*
 6. *Description of Land.*—*How Construed.*—That part of a deed which undertakes to describe the premises conveyed is always construed with great liberality, and a deed is never to be so construed as to render it void, if any other construction can be given it. *Grigsby v. Akin, 521*

DEFALCATION.

See OFFICE AND OFFICER, 1.

DELIVERY.

See GIFT, 2.

DESCENTS.

See DECEDENTS' ESTATES, 9.

DESCRIPTION OF LAND.

See DEED, 6; MECHANIC'S LIEN, 1; TAXES, 14.

DESERTION.

See HUSBAND AND WIFE.

DITCH.

See DRAINAGE.

DIVORCE.

1. *Custody of Child.*—*Status Fixed by Decree.*—*How Status May be Changed.*—The decree in a divorce suit awarding the custody of a child to one of the parties, fixes the status of the child as between the parties until modified or set aside for cause shown by some subsequent, or supplemental, proceeding in the same cause. *Leming v. Sale, 317*
2. *Alimony.*—*Evidence.*—*Pension.*—For the purpose of determining the amount of alimony to be given, the wife may testify as to the amount of pension money the husband is receiving. *Hedrick v. Hedrick, 522*
3. *Same.*—*Alimony.*—*When Not Excessive.*—An allowance of \$1,100 as alimony is not excessive where the custody of two small children is given to the wife, the three remaining children of the family being able to care for themselves, and the husband is the owner of real estate worth two thousand dollars, in the purchase of which three hundred dollars of the wife's money was used. *Ib.*
4. *Same.*—*Custody of Children.*—*Discretion of Trial Court.*—*Supreme Court.*—The Supreme Court will not disturb an order of the trial court awarding the custody of the children, unless it appears that the court has abused its discretion. *Ib.*

DRAINAGE.

1. *Cleaning Out Ditch.*—*Assessment by County Surveyor.*—*Collection of.*—*Action to Enjoin.*—*When Injunction will Lie.*—*Proper Remedy.*—*Appeal.*—Under the act of April 6th, 1885 (Acts 1885, p. 141), investing the county surveyor with the power to clean out ditches, and restore them to their original dimensions, and to assess the costs against the lands originally assessed for the construction of the ditch, etc., and providing for an appeal from the decision of the surveyor by any party aggrieved, an action will not lie to enjoin the collection of an assessment made by the county surveyor, unless it be affirmatively shown that the acts of the surveyor are not merely erroneous, but absolutely void, and without any authority. The surveyor being invested by statute with power to make the repairs and assessments, the only remedy of persons aggrieved by reason of an erroneous assessment is by appeal, and the assessment can not be attacked collaterally in a proceeding for injunction. *Terre Haute, etc., R. R. Co. v. Soice, 105*
2. *Same.*—*When Injunction will not Lie.*—*Complaint.*—*Demurrer.*—Where it does not appear in the complaint in an action to enjoin the collection of an assessment made by the county surveyor under the above section, that the amount is not assessed against the particular property owned by the plaintiff which is liable for the payment of such assessment, nor that the defendant will collect or attempt to collect the same by distress and sale of any other property of the appellant, the complaint is bad on demurrer. *Ib.*
3. *Establishment of Ditch.*—*Verdict.*—*Sufficiency of.*—In a proceeding to es-

establish a public ditch, a verdict reading: "We, the jury, find for the petitioner that the proposed ditch will be of public benefit and utility; that the assessments for its construction are in proportion to its benefits; and that the route thereof is practicable," fills the requirements of section 4294, R. S. 1881, and is sufficient where no objection is made by remonstrance or otherwise in the commissioners' court.

Budd v. Reidelbach, 145

4. *Same.*—*Appeal from Commissioners.*—*Questions Triable in Circuit Court.*—On appeal to the circuit court from the order of the commissioners establishing a ditch, only such objections can be relied on as were appropriately presented to the board of commissioners. *Ib.*
5. *No Notice.*—*Collateral Attack.*—An order made establishing a ditch without notice to those interested is void; but if only part have been notified, it is void as to all those who have not received notice. Those who have not received notice may attack the proceeding collaterally. *McCollum v. Uhl, 304*
6. *Same.*—*Collateral Attack for Want of Notice.*—*Pleading.*—The person who collaterally attacks an order establishing a ditch and the assessments incident thereto, because of lack of notice, must aver in his complaint, fully and specifically, that no notice was given. *Ib.*
7. *Same.*—*Notice.*—*Presumption as to Giving, and as to the Order Establishing the Drain.*—In a collateral attack upon an order establishing a ditch, and making an assessment, it will be presumed that the court establishing the ditch found, as a jurisdictional fact, that a notice was duly given before it entered the order. *Ib.*
8. *Same.*—*Priority of Tax and Ditch Lien.*—The lien of the State for taxes is paramount and superior to the lien of a ditch assessment. *Ib.*
9. *Same.*—*Redemption from Tax Sale by Holder of Ditch Lien.*—The holder of a ditch lien has a right to redeem from a sale of the land for taxes. *Ib.*
10. *Same.*—*Foreclosure of Tax Lien — Parties to Ditch Proceeding.*—*Party Acquiring Ditch Lien.*—The holder of a tax lien seeking to foreclose it after a ditch is established, and before its construction is let, should make parties to his petition all who were parties to, and affected by the ditch proceedings; and any person acquiring the ditch lien, or any part of it, by reason of his having constructed the ditch, after the commencement of the proceeding to foreclose the tax lien, will not be bound thereby, unless the parties to the ditch proceedings are made parties to the tax lien foreclosure proceedings. *Ib.*
11. *Appeal.*—*Parties.*—*Judgment for Costs.*—*Collateral Attack.*—Under the drainage law of 1875 (Acts 1875, p. 97) an appeal from the board of county commissioners transfers the entire cause to the circuit court for trial *de novo*, and all the persons who were parties to the cause before such board are parties in the circuit court, and are bound by the judgment for costs rendered, and they can not attack it by an injunction to restrain its collection. Their remedy is by appeal. *Mills v. Hardy, 311*
12. *Repair of Ditches.*—*Surveyor's Assessment — Remedy of Aggrieved Person.*—The remedy of a land-owner who complains of an assessment made by the county surveyor, under Elliott's Supp., section 1193 (Acts 1885, p. 141), to reimburse the county treasury for money expended in repairing a ditch, is by appeal to the circuit court from such assessment, and not by a suit to restrain the treasurer of the county from collecting it. *Goff v. McGee, 394*
13. *Straightening Watercourse.*—*Drainage Commissioners.*—*Jurisdiction.*—Under the statutes of this State, authority is given to drainage commissioners to alter or change the channel of watercourses only when,

as expressed in the act, it is a "method of drainage." Acts 1885, p. 129. The primary object of the statute is the reclamation of wet lands, and the power to alter and straighten watercourses is a mere incident, and only to be exercised when it becomes necessary to promote drainage. A proceeding to establish a drain where the primary purpose is to straighten a watercourse, and the drainage a mere incident, is not within the jurisdiction conferred upon the circuit court by the above act. *Scruggs v. Reese*, 399

DRAINAGE COMMISSIONERS.

See DRAINAGE, 13; MANDAMUS, 2.

DUPLICITY.

See CRIMINAL LAW, 2, 5.

EASEMENT.

See QUIETING TITLE.

1. *Parol License.—When Irrevocable.*—A naked parol license to enjoy an easement over land is revocable by the licensor at any time while it remains executory, but an executed parol license to use another's land, granted upon a consideration, or upon the faith of which money has been expended, can not be revoked. *Messick v. Midland R. W. Co.*, 81
2. *Way of Necessity.*—The owner of a twenty-acre tract of land, bounded on the north by a public highway, the only highway adjoining his land, used as a roadway a strip of ground along the east side of the tract to reach the public highway on the north. The owner died, and, upon partition, five acres on the north end of the twenty-acre tract were set off to his widow, and the remaining fifteen acres sold to the plaintiff. The widow sold the five acres to the defendant, who denied the right of the plaintiff to use the same in passing from his land to the public highway.
Held, that the plaintiff was entitled to an easement over the defendant's land. *Ellis v. Bassett*, 118
3. *Same.—Partition Among Heirs.*—A partition of real estate among heirs carries with it, by implication, the same right of way from one part to and over the other as had been plainly and obviously enjoyed by the common ancestor, in so far as it is reasonably necessary for the enjoyment of each part. *Ib.*
4. *Same.*—Where the owner of an estate imposes upon one part an apparent and obvious servitude in favor of another, and at the time of the severance of ownership such servitude is in use, and is reasonably necessary for the fair enjoyment of the other, then, whether the severance is by voluntary alienation or by judicial proceedings, the use is continued by operation of law. *Ib.*
5. *Same.—Notice to Purchaser.*—Where the facts show that the way was a way of necessity, that it was open and visible, and had been used continuously for many years, this constitutes sufficient notice to a purchaser of the existence of the easement. *Ib.*
6. *Implied Dedication.*—The implied dedication by the owner of land platted for a town site of a strip of land fronting a river, to the public as a common, for the purpose of a landing, and for access to the river, does not vest in the town, or in the public, the fee of the land, but the fee remains in the grantor, subject to the easement.
Town of Freedom v. Norris, 377
7. *Same.—Alluvial Accretions.*—Such easement attaches to alluvial additions caused by changes in the course of the river, and the public has the right to pass over such additions for the purpose intended by the dedication. *Ib.*

8. *Same.—Abandonment of Landing.—Non-User of Easement.*—A non-user of the easement, for the purpose intended, for a period of thirty years, due to an abandonment of commerce upon the stream, will be taken as an abandonment of the easement. *Ib.*

ELECTIONS.

See CONSTITUTIONAL LAW, 1 to 3.

1. *Contest.—Limitation of Time for Trial Before County Commissioners.—Continuance.*—The provision of section 4761, R. S. 1881, limiting to twenty days the duration of a session of the board of county commissioners when convened to try a contested election case, is mandatory, and the limitation applies to the entire proceeding, and not merely to the hearing of testimony. Where, therefore, the contestor before the expiration of the term obtains a postponement which carries the cause beyond the time limited, he thereby discontinues his contest. *English v. Dickey, 174*
2. *Same.—Computation of Time.*—Section 1280, R. S. 1881, applies in computing the time, and Sundays are excluded only as provided by that section. *Ib.*
3. *Same.—Discontinuance.—Costs.*—Where an election case is discontinued the costs should be taxed against the contestant. Section 4765, R. S. 1881. *Ib.*

ELECTRIC LIGHT.

See MUNICIPAL CORPORATION, 5.

EMANCIPATION.

See PARENT AND CHILD.

EMINENT DOMAIN.

1. *Condemnation Proceedings.—Measure of Damages.—Assessment of Damages.*—The rule in condemnation proceedings is that all damages present or prospective, that are the natural or reasonable incident of the improvement to be made, or work to be constructed, not including such as may arise from negligence or unskilfulness, or from the wrongful act of those engaged in the work, must be assessed. Damages are assessed once for all, and the measure should be the entire loss sustained by the owner, including in one assessment all injuries resulting from the appropriation. *Chicago, etc., R. W. Co. v. Hunter, 213*
2. *Same.—Damages.—What May be Considered in Estimating.—Railroad.*—In an action for the appropriation of lands by a railroad company, it was proper to instruct the jury that they might consider the manner in which the land would be divided by the line of the railroad as affecting the size and shape of the fields, the access of stock to water, the passage from one part of the farm to another, the possible danger from fire emitted from the locomotives, etc. *Ib.*

EMPLOYER AND EMPLOYEE.

See INSTRUCTIONS TO JURY, 2, 3; MASTER AND SERVANT.

EQUITY.

See PRINCIPAL AND SURETY, 2, 3.

- Lien upon Real Estate.—Foreclosure of.—Equity Jurisdiction.—How Determined.*—Where a lien upon real estate is to be foreclosed, the equity power of the court is called into exercise, and the entire issue is for trial by the court. Where a specific decree is required there is an exercise of equity jurisdiction, and as the main feature of the case is equitable, it controls the incidents. *Brighton v. White, 320*

ESTOPPEL.

See CONSTITUTIONAL LAW, 3; DECEDENTS' ESTATES, 8; DEED, 1; FORMER ADJUDICATION; PARTITION, 2; RAILROAD, 9.

Sale of Real Estate.—Acquiescence.—Pleading.—In an action to enjoin the sale of certain real estate on execution to satisfy a judgment in favor of the defendant and against a third person, the complaint alleged that before the judgment was recovered the real estate was conveyed to the plaintiff and the deed recorded on the same day. The answer alleged that at the sale on execution (which took place after the complaint was filed) the plaintiff stood by and saw the real estate sold as the property of the judgment debtor and purchased by the judgment creditor and made no claim thereto, but it failed to allege that the defendant had no notice of the sale to the plaintiff of the real estate in controversy.

Held, that the answer was insufficient as a plea of estoppel, and was demurrable. *Blue Ridge, etc., Co. v. Duffy*, 79

EVIDENCE.

See BASTARDY, 2; BILL OF EXCEPTIONS; CRIMINAL LAW, 6, 8; DECEDENTS' ESTATES, 19, 20; DEED, 5; DIVORCE, 2; INSTRUCTIONS TO JURY, 1; OFFICE AND OFFICER, 4; PARTITION, 3; PRACTICE, 1, 11 to 13, 24; RAILROAD, 4; STREET RAILWAY, 5; TRUST AND TRUSTEE, 3.

1. *Res Gestæ*.—Where the question at issue is whether the husband or the wife was a member of a partnership, conversations between the wife and a member of the partnership relating to the management of the business are admissible as part of the *res gestæ*.

Bingham v. Walk, 164

2. *Claim of Ownership.—Conversation.*—An interrogatory addressed to a witness requiring him to call to mind a conversation he has had with a certain person, and to state if it amounted to asserting a claim of ownership of the property in question, can be excluded by the court.

Dickey v. Shirk, 278

3. *Conflicting.—Verdict not Disturbed*.—Where there is a conflict of evidence upon a disputed question of fact, the decision of the trial court will not be disturbed.

Louisville, etc., R. W. Co. v. Hendricks, 462

EXECUTION DEBTOR.

See REAL ESTATE, ACTION TO RECOVER.

EXECUTORS AND ADMINISTRATORS.

See DECEDENTS' ESTATES, 3, 17, 18, 22; GUARDIAN AND WARD, 2; PRACTICE, 25.

EXEMPTION FROM EXECUTION.

1. *Tort*.—Under our statute, no exemption can be had upon a judgment rendered in actions for tort. *Ries v. McClatchey*, 125
2. *Same.—Misjoinder of Causes of Action.—Contract and Tort*.—But where the plaintiff improperly unites his right of action for a tort with his right of action on a contract, and takes judgment in such form as to preclude the possibility of separating one from the other, he thereby reduces his superior rights in the action sounding in tort to a level with his inferior rights in the action on contract, and the defendant is entitled to treat the judgment as rendered upon contract, and to claim his exemption. *Id.*

EXHIBIT.

See PLEADING, 3.

FENCE.

See RAILROAD, 10.

FINAL SETTLEMENT.

See DECEDENTS' ESTATES, 7, 8, 21.

FORECLOSURE.

See CHATTEL MORTGAGE, 1; DRAINAGE, 10; EQUITY.

FORFEITURE.

See LIFE INSURANCE, 2.

FORMER ADJUDICATION.

Quieting Title.—Right of Alienation.—Estoppel.—Section 18, 1 G. & H., provides that if a widow remarries, holding real estate in virtue of a previous marriage, such widow may not during such marriage, with or without her husband's assent, alienate such real estate, and if during such marriage she shall die the real estate shall go to her children by the previous marriage. While this statute was in force, during a second marriage, a widow and her children conveyed real estate held by descent from the widow's former husband. In a suit instituted by the grantee, in which the widow and her children were made parties, the title was quieted.

Held, that the children were estopped by the decree to dispute, upon the widow's death, the validity of the alienation, having failed to do so in the suit to quiet title. *Hawkins v. Taylor*, 431

FRAUD.

See CHATTEL MORTGAGE, 4; CONTRACT, 1 to 3; TAXES, 12.

FRAUDULENT CONVEYANCE.

See PRINCIPAL AND SURETY, 3.

Prior Contract.—Consideration Love and Affection.—Conveyance After Debt Created.—A conveyance of real estate, in pursuance of a previously made contract, for natural love and affection, executed without a fraudulent intent after a debt is created, and which debt the debtor supposes is adequately secured by mortgage, is valid.

Nichols, Shepard & Co. v. Burch, 324

GAMING.

1. *Dealing in Options.—Loan of Money to be Used in.—Lender's Knowledge.—When Recovery will be Defeated.*—Where a person loans money, and, as a part of the arrangement, it is to be used in dealing in options or futures, and he is interested in such contracts or assists in bringing the parties together, and aids in consummating such contract, by conspiring with and urging and aiding the party to whom he loans the money to make such investment, and loans him the money to be so invested, he becomes *particeps criminis*, and the law will not aid him to collect the money which he parted with under such circumstances. *Plank v. Jackson*, 424
2. *Same.—Instruction.*—An instruction that the mere knowledge on the part of the lender that the borrower intends to use the money to pay a debt which the borrower is under no legal obligation to pay by reason of its growing out of a gambling or unlawful contract, makes a note given for such money so loaned void, is erroneous. *Ib.*
3. *Same.—Section 4950, R. S. 1881, Construed.*—Section 4950, R. S. 1881, was enacted to prevent the borrowing of money to be at the time wagered, and does not include cases where money is borrowed with

an intention on the part of the borrower to invest it in some speculative transaction at some time in the future, or to pay losses theretofore sustained.

GIFT.

1. *Inter Vivos.—Retention of Possession.—Effect of.—Written Instrument.—Construction of.*—R. executed an instrument in writing which contained the following provision: "I, John Robbins, * * hereby give to the trustees, etc., the principal of a note of seven hundred dollars, * * said sum of seven hundred dollars to be given in trust to the said trustees when the said note falls due, on the 4th day of August, 1890, and to be by them invested according to their best judgment." The possession of the promissory note was retained by R. and was never delivered by him to the trustees.
Held, that the written instrument did not constitute a gift *inter vivos*, and that the promissory note mentioned therein did not become the property of the trustees.
Held, also, that the writing constituted a mere agreement to give a sum in the future, and that under it no property passed.
Gammon, etc., Seminary v. Robbins, 85
2. *Same.—What Constitutes.—Necessity of Delivery.—Character of Delivery.*—To constitute a valid gift *inter vivos* of personal property, there must be a delivery of the article during the lifetime of the donor, with an intention to give. A manual delivery, however, is not always necessary. It will be sufficient if the delivery is as complete as the thing and the circumstances of the parties will permit. *Ib.*

GRANTOR AND GRANTEE.

See COVENANT, 2; SUBROGATION, 2.

GRAVEL ROAD.

1. *Free.—Act of 1889 for Purchase of Road is Valid.*—The act of March 8, 1889 (Acts 1889, p. 276), providing for the purchase of toll roads is constitutional, and does not violate either section 22, article 4, or section 1, article 10, of the Constitution. *Gileon v. Board, etc., 65*
2. *Same.—Majority of Votes Cast Gives Authority to Purchase.*—If the requisite number of freeholders, citizens of two or more townships, jointly petition the board of county commissioners for an election to determine if a certain designated toll road shall be purchased and made a free road, and an election is ordered and held pursuant to the request of such petition, such townships thus petitioning constitute an election district; and if a majority of all the votes cast in such district is in favor of such purchase, the purchase must be made, although a majority in one or more of the townships is against it. *Ib.*
3. *Same.—Exemption of Realty from Taxation.—Validity of Statute.*—The provision in the statute exempting from taxation real estate previously assessed for free gravel roads, until other property has paid an amount equal to such assessments, does not render the statute void. *Ib.*
4. *Same.—Objections to Proceedings.—When to be Made.*—Objections to the petition for an election, notice thereof, appraisal of the road, and regularity of the election must be made before the final order for the purchase of the road is entered by the board of county commissioners. *Ib.*
5. *Construction of.—Issuance of Bonds for.—Action for Accounting Against County.—Bondholders May Maintain.—Extent of Equity Relief.*—Proceedings were instituted to construct a free gravel road. Assessments were made on the contiguous lands, and coupon bonds were sold to the plaintiffs, who paid the full face value thereof, to raise money for

the construction of the road. The money arising from the sale of the bonds was paid into the general fund of the county. Separate suits were afterwards instituted by certain land-owners to enjoin the county officers from placing the several amounts assessed against their respective tracts of land on the tax duplicate, and to declare their assessments void. The proceedings to restrain the officers were sustained in the court below, and several judgments were rendered according to the prayer of the complaint. An appeal was taken in one of the cases, and the judgment was reversed. The bondholders were not parties to these proceedings, and had no notice of their institution.

Held, that the bondholders could maintain an action in equity against the county and its officers for an accounting of the money which had been received from such assessments, and which it was alleged had gone into the general fund of the county, and have the same applied to the liquidation of the bonds, together with the interest due thereon.

Held, also, that the bondholders could compel the officers who were charged with the duty of collecting the assessments to place on the tax duplicate the assessments which had been set aside.

Held, also, that where a court of chancery takes jurisdiction of a cause for any purpose, it retains it under its control for all purposes, and administers complete relief, as the justice of the case may require.

Spidell v. Johnson, 235

GUARDIAN AND WARD.

1. *Setting Aside Guardian's Report*.—In the absence of a statute providing for the setting aside of the final reports of guardians, such actions fall within the provisions of the act concerning the settlement of decedents' estates. *Horton v. Hastings, 103*
2. *Action Against Guardian.—Administrator's Discharge*.—The approval of the final settlement and discharge of the administrator precludes the bringing of an action against the guardian, either upon his bond, or to set aside his report. *Ib.*

GUARDIAN'S REPORT.

See GUARDIAN AND WARD.

HIGHWAY.

See STREET IMPROVEMENT.

HUSBAND AND WIFE.

See DECEDENTS' ESTATES, 9; TRUST AND TRUSTEE, 1, 2.

1. *Desertion by Husband.—Right of Wife to Crops Grown on Husband's Land*.—Where a husband deserts his wife and children, leaving them without support, the wife may cause the land left in her possession to be cultivated during his absence for the support of herself and children, and her rights in the crop are superior to the rights of a chattel mortgagee of the husband with notice of all the facts.

Loy v. Loy, 150

IMPEACHMENT OF WITNESS.

See CRIMINAL LAW, 7.

INDICTMENT.

See CRIMINAL LAW, 4, 5.

INFORMATION.

See CRIMINAL LAW, 1, 2.

INJUNCTION.

See DRAINAGE, 1, 2; JUDGMENT; MUNICIPAL CORPORATION, 1; TAXES, 3, 7.

1. *Application to Dissolve Pending Appeal.*—A motion to dissolve an injunction, made unsuccessfully in the lower court while an appeal from the order granting it is pending in the Supreme Court, is not sufficient to authorize the dismissal of the appeal, when it is not made to appear that the appellant has taken a position in the lower court inconsistent with the one he occupies in the Supreme Court, or that the position of the parties to the appeal has been in any manner changed or altered. *Davis v. Fasig, 271*
2. *Same.*—*Interlocutory Judgment.*—*What is not.*—In an action, to restrain the enforcement of a city ordinance, a submission of the case upon the complaint, a finding that the injunction should be granted and the granting of the injunction as prayed, and an order that it be continued "until the validity of the ordinance in question shall have been finally determined" in the Supreme Court, is not an interlocutory, but a final judgment. *Ib.*

INSTRUCTIONS TO JURY.

See BASTARDY, 1; CRIMINAL LAW, 9; GAMING, 2.

1. *Weight of Evidence.*—An instruction is properly refused which tells the jury what weight they should give to the evidence. The jury are the judges of the weight of the evidence. *Ohio, etc., R. W. Co. v. Percy, 197*
2. *Same.*—*Co-Employees.*—*Who are not.*—It is not error to refuse to instruct the jury in an action for damages for the death of an employee of a railroad company alleged to have resulted from a defective brake that the car-inspectors were the co employees of the brakemen. The company was charged with the duty of providing and maintaining safe appliances for use in the operation of its business. If this duty is intrusted to an agent, a car-inspector for instance, such agent stands in the attitude of the master, and is not a co-employee of the brakeman. *Ib.*
3. *Same.*—*Defective Machinery.*—*Knowledge of.*—*Employee*—It is proper to refuse to instruct the jury, in such an action, that it was the duty of the brakeman to know whether the brake was in good and safe condition, and if he continued to use or operate it without such knowledge and it proved to be unsafe, and because of its infirmity he was thrown from the car and lost his life, then his negligence contributed to the injury and no recovery could be had. *Ib.*
4. *Same.*—*Assuming Facts to be Established.*—*Effect of.*—An instruction is properly refused which assumes that the evidence establishes a fact, and then states what was the duty of a party in view of the fact so assumed to exist. *Ib.*
5. *Judged as Entireties.*—*Obvious Mistake.*—*Instruction not Vitiating.*—Instructions are not to be judged by detached clauses or sentences, but as entireties. Where a mistake in an instruction is so obvious that a jury could not have been misled thereby, there is no available error. *Anderson v. Anderson, 254*
6. *Interrogatories Showing Erroneous Instructions Harmless.*—If it appear affirmatively from an interrogatory, and the answer thereto, that the complaining party was not harmed by an erroneous instruction given, or by the refusal of a proper one, the error is immaterial. *Dickey v. Shirk, 278*
7. *Erroneous Instructions.*—*When Judgment not Reversed Therefor.*—Where the record affirmatively shows that the verdict is right upon the evi-

dence, the judgment will not be reversed because the court has erred in the instructions given to the jury. *Woods v. Board, etc.*, 289

8. *Action for Personal Injuries.—Instruction as to Peril of Life.—Propriety of.*—An instruction in an action for damages for personal injuries alleged to have been sustained by the plaintiff, is not erroneous which states, among other things, that the jury should "take into account the peril, if any there was, to plaintiff's life," and which concludes with the statement that only such damages shall be assessed "as will reasonably and justly compensate the plaintiff for his injuries." It was proper for the jury to consider the hazard and jeopardy in which the plaintiff was placed; in other words, the peril to his life, and allow such damages as resulted therefrom in determining the damages which he sustained, and his suffering in body and mind by reason of the injury. *Terre Haute, etc., R. R. Co. v. Bruner*, 542

INSURANCE.

1. *Loss by Fire.—Policy Construed.—Pro Rata Liability.*—The plaintiff held a policy in the defendant company for \$1,500. The policy was on twenty-one items of property which were classified in the policy, and opposite each item a valuation was affixed, making, in the aggregate, \$90,000. The policy provided that the company only insured one-sixtieth part of each of said sums, and that its liability was limited to such a proportion of the loss as the amount insured thereby bore to the entire amount of insurance. At the time of the fire the aggregate insurance on the property was \$60,000, and the loss \$51,000. *Held*, that under the terms of the policy the defendant company was liable for one-fortieth, and not sixtieth, of the loss.

Indiana Ins. Co. v. Hoffman, 250

2. *Application.—Warranties.*—Statements made by the insured in his application for insurance are not deemed warranties unless they are incorporated in the policy, or, in some appropriate method, referred to in that instrument. *Citizens' Ins. Co. v. Hoffman*, 370

3. *Same.—Conditions of Policy.*—Where the insured represents in his letter of application for insurance that a certain amount of insurance will be maintained, but the application is not incorporated in the policy or made a part thereof by reference, no inference arises that the policy was issued upon the condition mentioned in such letter of application. *Ib.*

INTENTION.

See WILL, 4.

INTERPLEADER.

Bill.—Sufficiency of.—A bill of interpleader filed under section 273, R. S. 1881, which does not aver that the alleged claimant ever demanded payment of the note sued on, or claimed that it had any right to collect the note, nor aver that the defendant paid, or offered to pay, the amount due into court or surrender the mortgaged property, is demurrable. *Mansfield v. Shipp*, 55

INTERROGATORIES TO JURY.

See INSTRUCTIONS TO JURY, 6.

Antagonistic Interrogatories.—If two interrogatories, and the answers thereto, are antagonistic, and in opposition to each other, they neutralize and destroy each other, and must be disregarded. *Dickey v. Shirk*, 278

INTERSTATE COMMERCE.

See NATURAL GAS, 5, 6.

JOINT TENANCY.

See WILL, 2.

JUDGMENT.

See APPEAL, 1, 3; BASTARDY, 3; CHATTEL MORTGAGE, 1; INJUNCTION, 2; SPECIAL FINDING.

Justice of the Peace.—Irregularities.—Relief.—Injunction.—Appeal.—Injunction will not lie to restrain the collection of a judgment rendered by a justice of the peace because of irregularities occurring at the trial. The remedy is by appeal. *Parsons v. Pierson*, 479

JUDICIAL KNOWLEDGE.

See NATURAL GAS, 1.

JURISDICTION.

See DRAINAGE, 13; RAILROAD, 2.

JUROR.

1. *Relationship to Counsel.—Setting Aside Verdict.*—A verdict will not be set aside because a juror was permitted to serve who was the husband of a niece of the wife of one of the defendant's attorneys. *Miller v. Louisville, etc., R. W. Co.*, 97
2. *Competency of.—Defective Eyesight.*—A juror whose eyesight is so defective that he can not see the expression of the faces of the witnesses, nor observe their deportment or demeanor, is not competent, especially where various articles illustrative of the testimony are placed before the jury. *Rhodes v. State*, 189
3. *Same.*—The defendant was not negligent where his counsel fully examined the juror as to his qualification, and there was nothing in his answers to indicate that his eyesight was defective. *Id.*

JUSTICE OF THE PEACE.

See JUDGMENT.

LARCENY.

See CRIMINAL LAW, 2.

LEGISLATURE.

See CONSTITUTIONAL LAW, 6, 7.

LICENSE.]

See EASEMENT, 1.

LIEN.

See DECEDENTS' ESTATES, 1, 6; TAXES, 2, 14.

1. *Labor Performed in Working Mine.—Expenses Incurred by Assignee.—Preference.*—The costs and expenses, including wages of a laborer that he employed, incurred by the assignee of a mining property, are made by statute a preferred claim and lien upon the property assigned, prior to all other claims, even to those for labor incurred prior to the assignment of the property. *Elliott's Supp.*, section 1598. *Shull v. Fontanet, etc., Ass'n*, 331
2. *Same.—Assignment of Property.—Foreclosure of Claim.—Innocent Purchaser.—Laborer's Claim.*—A mining company made an assignment of all its property to F., authorizing him in the deed of assignment to operate and develop the mine, pledging him the property as security for any money he advanced of his own in developing the mine, and directing him to pay certain debts. Prior to the assignment a mortgage was given D. on the property assigned, and recorded.

C. held a duly recorded mechanic's lien, and S. a valid claim for mining labor rendered the assignee. F. took possession of the property, advanced \$5,000, and a year afterwards foreclosed his lien except as against D., C. and S., and at the sale under the decree the Coal Bluff Mining Company purchased it. The plaintiff worked for F. in the mine, but the purchaser had no knowledge of his claim for wages. *Held*, that the plaintiff was entitled to foreclose his lien for wages against the property in the hands of the purchaser, standing on the same basis with the claims of F.; and the fact of F. abandoning the trust and foreclosing his claims did not affect the plaintiff's lien or rights. *Ib.*

LIFE-ESTATE.

See WILL, 1.

LIFE INSURANCE.

1. *Premium Overdue and Unpaid.—Validity of Provision Against Liability.*—A provision in a policy of insurance that the insurer shall not be liable for a loss occurring while a note given for premium is overdue and unpaid, is valid, and exonerates the insurer from liability while such delinquency continues.
Michigan M. L. Ins. Co. v. Ouster, 25
2. *Same.—Waiver of Forfeiture Incurred by Non-Payment of Premium.*—A provision in a policy of insurance providing for the forfeiture of the policy for non-payment of the premium is for the benefit of the insurer, and may be waived by it. *Ib.*
3. *Same.—Premium Note Overdue.—Extension of Time of Payment.—Loss During Extension.*—A clause in a policy of life insurance provided that if any premium should be settled by note, such settlement should not be deemed a payment, but only an extension of the time for the payment of that premium; and if the note, or any renewal of it, should not be fully paid when due, then, for any loss occurring while such note remained due and unpaid, the insurer should not be liable, but the whole amount of the premium included in such note should be considered as earned, and the insurer might collect it. The insured failed to pay a premium when due, and gave his note therefor, due in seven months, and before this note was due, the time of payment was extended by mutual agreement five months, during which five months he died.
Held, that there was a sufficient consideration to support the agreement to extend the time of payment the extra five months, that it was not a mere indulgence to the maker; and that the insurer was liable for the loss occurring under such policy. *Ib.*
4. *Same.—Proof of Extension of Note.—Tile Season.*—Where it is alleged that the note was extended until the season for the sale of tile for a designated year had expired, evidence of the period constituting the tile season is admissible to show such extension. *Ib.*

LIS PENDENS.

Purchaser without Notice.—New Trial as of Right.—Reversal of Judgment.—Where a plaintiff in ejectment recovers a judgment for possession against the owner in fee, who is in possession of the land, and within the year allowed by statute the defendant obtains a new trial as of right, upon which he recovers, one who purchases without notice a mortgage executed by the plaintiff after the first judgment and before the new trial is taken, is not an innocent purchaser within section 1066, R. S. 1881.
Griswold v. Ward, 389

MALPRACTICE.

1. *Pleading.—Waiver of Tort.*—In an action against a physician for mal-

practice, the plaintiff may elect to sue on contract, and thus waive the tort.
Lane v. Boicourt, 420

2. *Same.—Pleading.—Actions Ex Contractu or Ex Delicto.*—A complaint in an action against a physician for malpractice alleged that the plaintiff employed the physician to give professional attention to his wife, in childbirth, for which compensation was to be paid, and that the physician contracted with the plaintiff to render the required services; that, as a breach of said contract, the physician failed to give the plaintiff's wife proper attention, causing her great injury.
Held, that the complaint was in contract, and not in tort. Ib.

MANDAMUS.

See CONSTITUTIONAL LAW, 2.

1. *Ministerial Officer.—Specific Fund.—Distribution of.*—A ministerial officer, who has a specific fund in his hands, may be compelled by mandamus to make lawful distribution of the fund. This remedy is proper, for the reason that the officer is liable, if liable at all, for the violation of a duty imposed upon him by law.
Ingerman v. State, ex rel., 225
2. *Same.—Drainage.—Ditch Commissioner.—Cost of Improvement.—Must Pay Out of Specific Fund.—Demand before Suit.—Parties to the Action.*—Where a ditch commissioner has collected the assessments levied for the construction of a ditch, it is his duty, upon proper demand, to pay the amount due for the construction of the ditch out of the specific fund. In a mandamus proceeding to compel him to do so, he can not successfully urge as a reason for withholding the fund that the landowners who paid the assessments which created the fund are not parties to the action.
Ib.
3. *Same.—Petition for.—Necessity of Demand.—Public Officer.—Presumption as to.*—In such an action a demand is essential. The presumption is that an officer will do his duty upon request, and to put him in the wrong a demand is necessary. Where the duty is owing to a private person, and not to the public, a demand must be alleged with precision in the petition for a writ of mandamus.
Ib.

MARRIED WOMAN.

See CONTRACT, 6; REAL ESTATE, 2; REAL ESTATE, ACTION TO RECOVER, 1.

- Loan to.—Suretyship.*—Where a married woman personally applies for a loan, and the loan is made in good faith under the belief that the money is for her own use, and she executes a mortgage upon her separate property as security, her husband joining, such married woman is liable as principal, and the fact that there is a secret understanding between the husband and the wife that the money is being borrowed for the husband's use, and is handed to him by the wife as soon as received, is immaterial.
Cummings v. Martin, 20

MASTER AND SERVANT.

1. *Railroad.—Damages.—Defective Machinery.—Employee's Means of Knowledge.—What Complaint Must Aver.*—In an action for damages against a railroad company for the death of a brakeman alleged to have been caused by the unsafe and defective condition of a brake on one of the defendant company's cars, it is not necessary to aver facts in the complaint, showing affirmatively that the employee had no means of ascertaining the defect. It is the duty of the master to provide suitable and proper appliances; the employee has the right to rely on the master having discharged his duty, and he is not required to search for defects, nor is he required to aver facts in his complaint,

showing that he had no means of knowledge. It is sufficient to aver that he had no knowledge of such defect.

Ohio, etc., R. W. Co. v. Percy, 197

2. *Same.—Defendant's Knowledge of Defective Machinery.—Averment of Complaint as to Sufficiency of.—Demurrer.—Negligence.*—Where the complaint alleges that the brake was defective in certain particulars, and that the defendant company negligently used such brake in its business upon the day of the injury, and for many days prior thereto, a demurrer will not lie on the ground that the complaint does not allege that the defendant company had any knowledge of the defect, by means of which it is averred the deceased received the fatal injury. *Ib.*
3. *Same.—Safe Appliances.—Duty of Employer to Furnish and Maintain.—Knowledge of Defects Chargeable to Employee.*—The duty of the employer does not end with simply providing safe machinery and appliances for the use of his employees, but the further duty is imposed of continuously exercising reasonable diligence and care to ascertain and know the condition of such machinery and appliances, and to keep them in a safe and proper condition. The employee is charged with the knowledge of such defects as he could have ascertained by the exercise of reasonable care and diligence in this behalf. *Ib.*

MEASURE OF DAMAGES.

See EMINENT DOMAIN.

MECHANIC'S LIEN.

1. *Notice.—Description.*—A notice of intention to hold a mechanic's lien described the property as the "east half of the northwest quarter of section 36, township 15, range 13; also the west half of the southwest quarter of section 25, township 15, range 13." The correct description was the "northeast quarter of section 26, in township 15, range 13, except fifty acres out of the northwest corner." *Held*, that the description, aided by the reference to the house itself which the notice contained, made the identification complete, notwithstanding the mistake in the designation of the section, and that the notice was sufficient as against judgment creditors claiming a superior lien. *McNamee v. Rauck, 59*
2. *Surety on Contractor's Bond can not Enforce Lien for Materials Furnished.*—A surety on a contractor's bond who undertakes that the contractor shall pay for all materials used in the building can not enforce a lien for materials furnished by him at the request of such contractor. *McHenry v. Knickerbacker, 77*

MEDICAL EXAMINATION.

See PRACTICE, 27.

MINOR.

See PARENT AND CHILD.

MISCONDUCT OF JURY.

See NEW TRIAL, 7.

MISJOINDER OF CAUSES OF ACTION.

See EXEMPTION FROM EXECUTION, 2.

MORTGAGE.

1. *Mortgage to Secure Two Notes Payable to Different Persons.—Priority.*—A mortgage given to secure two notes identical in date, amount, and time of maturity, but payable to different persons, is equivalent to

a separate mortgage to each, without giving priority to either mortgagee. *Chaplin v. Sullivan, 50*

2. *Payment of Prior Encumbrance.—Tender.*—Where a husband and wife executed a mortgage on certain real estate, to secure a loan, and a portion of the money borrowed was applied to the payment of prior encumbrances on the mortgaged premises, they can not defeat the enforcement of the mortgage, though a part of the mortgage debt is not enforceable, when there has been no return or tender of the amount paid to discharge the prior encumbrances. *Hormann v. Hartmetz, 353*

MUNICIPAL CORPORATION.

1. *Injunction.—Validity of an Ordinance.*—A court of equity may enjoin the enforcement of a void city ordinance in order to prevent a multiplicity of actions, or at the instance of any person whose interests are to be injuriously affected thereby; but if it is not void, a court of equity can not determine whether or not the plaintiff is guilty of its violation. *Davis v. Pasig, 271*
2. *Same.—When Entire Ordinance Must be Void.*—Unless the party asking an injunction points out some particular provision in the ordinance that infringes upon his rights or privileges, in order to justify a court in declaring the ordinance void, the ordinance must be void *in toto*. *Ib.*
3. *Same.—Saloon Closing Ordinance.—Validity.*—An ordinance requiring all keepers of saloons, and of other like place, to eject every person not regularly employed therein at the hour of 11 P. M., to close and lock the doors securely, and permit no ingress thereto between that hour and 5 A. M.; requiring all persons not employed to depart between such hours, when requested; making it unlawful to open the door, or leave it unlocked, or to permit ingress thereto between such hours, and extending the same rules and regulations to Sundays, legal holidays and election days, is valid. *Ib.*
4. *Payment by Yearly Instalments.—Indebtedness Not Created for Aggregate Sum.*—Where a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly instalments, since the debt for each year does not come into existence until the compensation for each year has been earned. *Crowder v. Town of Sullivan, 486*
5. *Same.—Contract for Electric Lights.—Notice.*—The statute confers upon municipal corporations authority to contract for electric lights, and does not require that notice should be given inviting proposals, nor does it require notice in any form. *Ib.*
6. *Same.—Use of Streets.—Exclusive Privilege to One Corporation.—Can not be Granted.*—A municipal corporation can not grant to a private corporation the exclusive privilege of using its streets for the purpose of supplying the corporation, or its citizens, with light, water, fuel, or the like. *Ib.*
7. *Same.—Use of Streets.—Special Ordinance Granting.—Validity of.—When General Ordinance Necessary.*—A special ordinance granting a permissive license to a designated corporation is effective. When a municipality attempts to regulate the mode of using its streets it must do so by a general ordinance; but when it simply grants a privilege to use the streets, and does not undertake to regulate the entire subject, a general ordinance is not indispensably necessary to authorize the licensee to use the streets. The rights acquired under a mere permissive license are subject to control under the delegated governmental power vested in the municipality. *Ib.*

MUNICIPAL INDEBTEDNESS.

See MUNICIPAL CORPORATION, 4.

NAME.

See SUMMONS.

NATURAL GAS.

1. *Qualities of.—Judicial Knowledge.*—The courts will take judicial notice of the qualities of natural gas, and that it is in a high degree inflammable and explosive. *Jamieson v. Indiana, etc., Co., 555*
2. *Same.—Police Regulation.*—Natural gas is so dangerous that its use may be made the subject of a police regulation. *Ib.*
3. *Same.—Transportation Through Pipes.—Pressure.—Act of March 4th, 1891, Regulating.—Validity of.*—The act of March 4th, 1891 (Acts 1891, p. 89), regulating the mode of procuring, transporting and using natural gas, which prohibits the use of more than the natural pressure or an artificial pressure exceeding three hundred pounds to the square inch, is a valid exercise of the police power, and is constitutional. *Ib.*
4. *Same.—Regulation of Use of Property.—Vested Rights.*—Said act is but a regulation of the use of property, and is not a taking of property without compensation, nor is it an interference with vested rights or in violation of the provision of the Federal Constitution that no person shall be deprived of property by any State without due process of law. *Ib.*
5. *Same.—Can not be Made Subject of General Commerce.*—Natural gas can not be made the subject of general commerce between the States because of its local nature and intrinsic qualities, and it can not, so far as local safety is concerned, be made the subject of uniform Federal legislation, but is a legitimate subject for reasonable police regulation. *Ib.*
6. *Same.—Interstate Commerce.—Act of March 4th, 1891, not a Regulation of —Case Distinguished.*—Natural gas, because of its local characteristics and peculiarities, and its inherent dangerous qualities, is a proper subject for State legislation, and the act regulating the pressure to be employed in its transportation through pipes, while it affects a commercial commodity, is but an exercise of the police power—a regulation of the mode of using property—and is not a regulation of interstate commerce in the constitutional sense of the term. *State, ex rel., v. Indiana, etc., Co., 120 Ind. 575, distinguished. Ib.*

NEGLIGENCE.

See MASTER AND SERVANT, 2.

1. *Contributory Negligence.*—The negligence of the driver of a wagon can not be imputed to one who is riding in the wagon with him, but the latter can not recover unless it affirmatively appears that he was free from contributory negligence. *Miller v. Louisville, etc., R. W. Co., 97*
2. *Traveller on Highway.—Voluntary Intoxication.*—If a traveller on a highway, by reason of his own voluntary intoxication, exposes himself to danger and receives injuries which he could, and by the exercise of ordinary prudence would have avoided if sober, he is guilty of contributory negligence, and can not recover for such injuries.

Woods v. Board, etc., 289

NEPOTISM.

See OFFICE AND OFFICER, 6.

NEW TRIAL.

See BASTARDY, 1; LIS PENDENS; PRACTICE, 3, 13.

1. *Surprise.—Testimony of Adverse Party's Witness.*—It is no cause for a

new trial that the unsuccessful party was surprised by the testimony of a witness called by his adversary. *Bingham v. Walk*, 164

2. *Same.*—*Motion.*—*Counter-Affidavits.*—Counter-affidavits controverting the facts contained in affidavits filed in support of a motion for a new trial may be received. *Ib.*
3. *As of Right.*—*Motion for.*—*When May be Made.*—*Motion in Arrest of Judgment.*—A motion for a new trial as a matter of right may be made after a motion in arrest of judgment has been filed. The rule that a motion for a new trial comes too late after a motion in arrest of judgment, only applies to motions for a new trial for cause, where the party has knowledge of the fact on which he grounds his motion for a new trial at the time of moving in arrest of judgment. *Anderson v. Anderson*, 254
4. *Same.*—*Section 1064, R. S. 1881, Construed.*—The provisions of section 1064, R. S. 1881, relative to new trials as a matter of right, are mandatory, and the court has no discretion, but must grant a new trial upon compliance with the requirements of the section, at any time within one year after the rendition of the judgment. *Ib.*
5. *Same.*—*Complaint.*—*When Authorizes New Trial as Matter of Right.*—*Joinder of Partition Count.*—*Effect of.*—Under a complaint by heirs of a grantor, the first paragraph of which seeks to have a deed set aside because of alleged fraud and undue influence exercised by the grantee over the grantor, and the second and third paragraphs of which are to quiet title to the same land, and for partition thereof respectively, a new trial may be claimed as of right by either party. The joinder of the count for partition does not deprive them of that right. *Ib.*
6. *Surprise.*—Where a party proceeds with a trial, fully cross-examines the witness whose testimony creates the alleged surprise, and takes the chance of a verdict, he can not have a new trial on the ground that he was surprised by the testimony, without showing a very strong and clear case. *Louisville, etc., R. W. Co. v. Hendricks*, 462
7. *Same.*—*Misconduct of Jury.*—*When Communication to Court is not.*—After a jury had been deliberating for some hours they sent by the bailiff to the court a communication as follows: "The jury stand eleven to one. We have stood that way all night. No hope of a verdict." The communication was shown to the plaintiff's attorneys. The misconduct of the jury, if misconduct at all, was not such as to entitle the defendant to a new trial. The misconduct of a jury must be gross, and clearly result in an injury to the complaining party, to justify the awarding of a new trial. *Ib.*

NOTICE.

See DRAINAGE, 5 to 7; EASEMENT, 5; MECHANIC'S LIEN, 1; MUNICIPAL CORPORATION, 5; PRACTICE, 21.

OFFICE AND OFFICER.

See MANDAMUS, 1, 3.

1. *Township Trustee.*—*Defalcation.*—*Vacation of Office.*—*Appointment of Successor.*—Where an officer becomes a defaulter, flees the State, leaves no one to care for the public affairs, and indicates a settled purpose to abandon the office, it may be deemed vacant without a judicial determination, and the vacancy may be filled by appointment. The sureties on the bond of the defaulting officer can not challenge the right of the appointee to prosecute an action for the recovery of the public money. *Osborne v. State, ex rel.*, 129
2. *Same.*—The presumption is that the power of appointment is rightfully exercised by the officer invested with that power. *Ib.*

3. *Same.—Collateral Attack.*—Where there has been an appointment to, and the actual incumbency of an office, a collateral attack on the right of the appointee to hold the office is unavailing. *Id.*
4. *Same.—Reports.—Evidence.*—The reports of a township trustee, showing an indebtedness to the township, will, unless satisfactorily contradicted, warrant a finding against him and his sureties. *Id.*
5. *Official Bond.—Breach.*—No recovery can be had upon a bond executed by a public officer unless a breach of official duty is shown.
State, ex rel, v. Galbraith, 501
6. *Same.—Superintendent of Hospital for Insane.—Nepotism.—Action on Bond.*—Section 2774, R. S. 1881, defining the duties of the superintendent of the Hospital for the Insane, does not make it his duty to demand or collect compensation from inmates of the hospital, nor forbid him from permitting persons not entitled to remain as inmates from being there maintained. By section 2776, R. S. 1881, such duty is imposed upon the trustees, and in the absence of proper by-laws adopted by them requiring the superintendent to exclude persons not entitled to remain in the hospital, neither he nor his bondsmen can be liable for the breach of such duty. *Id.*

OFFICIAL BOND.

See OFFICE AND OFFICER, 5, 6.

OPTIONS.

See GAMING.

ORDINANCE.

See MUNICIPAL CORPORATION, 1 to 2, 3, 7.

PARENT AND CHILD.

Minor Child.—Negligent Killing of.—Action by Father as Administrator.—When not Maintainable.—Emancipation of Child.—A father can not maintain an action as administrator of his deceased minor son to recover damages for the alleged negligent killing of his intestate unless there has been an emancipation of the infant. An averment in the complaint that at the time of his death said decedent was not, and for two months theretofore had not been, in the service of his parents, or either of them, is not sufficient to show such an emancipation.
Berry v. Louisville, etc., R. R. Co., 484

PARTIES.

See DECEDENTS' ESTATES, 6; DRAINAGE, 10 to 12; MANDAMUS, 2.

1. *Action by Ward After Attaining Majority.—Contract for His Benefit.—Necessary Parties.*—A. was indebted to plaintiff upon certain notes payable to his guardian, representing the balance of purchase-money for a stock of goods belonging to the ward and purchased by A. Thereafter A. sold said stock of goods to the defendants, who each agreed to pay said notes, and jointly also promised to do so, and relieve A. from all legal responsibility in the payment of the same. The ward, when he attained his majority, settled with his guardian, and in the settlement said notes were transferred to him. He brought suit against the defendants on the contract entered into between them and A. in reference to the payment of said notes.

Held, that the defendants could be sued jointly.

Held, also, that A. was not a necessary party to said action, the complaint not seeking to affect or change in any way his rights as fixed by the contract entered into between him and the defendants.

Romaine v. Judson, 408

2. *Same.—Pleading.—Answer.—Rescission of Contract Before Acceptance.—Written Agreement.—Parol Agreement in Contravention of.*—A paragraph of answer in such an action pleading a rescission of the contract before any acceptance of it by the plaintiff or his guardian for him, states a good defence, but a paragraph of answer pleading a parol agreement in contravention of the written agreement is bad. *Ib.*
3. *Same.—Answer.—Contract.—Plea of Mutual Mistake.—Fraud.—Reformation of Contract.—Misrepresentations of Law.*—A paragraph of answer in such an action which alleges a mutual mistake in the contract, and seeks to have it reformed, is good, as is also a paragraph which alleges that the defendant was induced by fraud to accept the bill of sale containing said contract, setting up the facts as to what the true contract was, and the fraudulent representations and deceit by which he was induced to accept it, and asking for its reformation. A paragraph is bad which alleges misrepresentations as to the law, and the necessity for a written contract, and as to the legal effect of the contract in question. *Ib.*

PARTITION.

See COSTS, 3; EASEMENT, 3, 4.

1. *Decree.—Collateral Attack.*—The owner in fee of certain real estate died intestate, leaving a widow and children. In 1855, in a suit for partition of the land, brought by certain of the children against the widow and the remaining children, the common pleas court appointed commissioners to make partition, and upon their report that they had assigned to the widow for her dower thirty-eight acres of the land, but were unable to partition the remainder among the children, ordered the sale of the entire tract, subject to the widow's dower. Upon the death of the widow, in 1888, the plaintiffs, heirs of the intestate, sued for partition of the thirty-eight-acre tract sold subject to the widow's dower, claiming that the commissioner's sale ordered by the court was void.
Held, that the court having jurisdiction both of the subject-matter and of the parties, the order of sale was not void, and can not be collaterally attacked. *Eller v. Evans, 156*
2. *Same.—Acquiescence.—Estoppel.*—The plaintiffs, having acquiesced in the order of sale more than thirty years, and having received and retained the purchase money paid for it, are estopped from now claiming any interest in the land as against the purchaser at the sale, and those claiming under them. *Ib.*
3. *Pleading.—General Denial.—Relinquishment of Widow's Interest.—Evidence.*—In an action for partition the heirs claimed one-third of the land, and the defendant the entire tract.
Held, that the title was put in issue, and that under sections 1055 and 1070, R. S. 1881, evidence was admissible under the general denial tending to prove a parol partition of the land between the widow and children, by which the widow's interest in the land in dispute was divested, she taking instead other lands equal in value to one-third of the land owned by her former husband, since such a partition would be a complete defence to the action. *Hawkins v. Taylor, 431*

PARTNERSHIP.

See REAL ESTATE.

1. *Surviving Partner.—Execution of Chattel Mortgage to Secure Firm Debt.*—A surviving partner of an insolvent firm may make a valid chattel mortgage of the partnership property to secure a firm debt. *First Nat'l Bank v. Parsons, 147*
2. *Same.—Section 6046, R. S. 1881.*—Sections 6046, et seq., R. S. 1881, re-

lating to the filing of inventories and appraisements by the surviving partner do not forbid the making of such mortgage. *Ib.*

PERSONAL INJURIES.

See INSTRUCTIONS TO JURY, 8; RAILROAD, 13.

PERSONAL PROPERTY.

See DECEDENTS' ESTATES, 10.

PETITION.

See GRAVEL ROAD, 4.

PLEADING.

See ABATEMENT; DECEDENTS' ESTATES, 5; DRAINAGE, 2, 6; ESTOPPEL; INTERPLEADER; MALPRACTICE; MASTER AND SERVANT, 1, 2; NEW TRIAL, 5; PARTIES, 2, 3; PARTITION, 3; QUIETING TITLE, 1; RECEIVER, 1; SET-OFF; SPECIFIC PERFORMANCE, 2.

1. *Sufficiency of Complaint.—Motion to Make More Specific.*—In the absence of a motion to make more specific, a complaint sufficiently alleges a conveyance of land to the plaintiff, which avers that the plaintiff "purchased" the same. *Falley v. Gribbling, 110*
2. *Complaint.—Joint Cause of Action.—Demurrer.*—A complaint not showing a cause of action in favor of all the plaintiffs is bad on demurrer. *Sedwick v. Ritter, 209*
3. *Exhibits.—Admissibility in Evidence.*—Where a certain sworn statement is set out in the complaint, the plaintiff can not object to its introduction in evidence by the defendant. *Citizens' Street R. W. Co. v. Robbins, 449*

POLICE POWER.

See CONSTITUTIONAL LAW, 6; NATURAL GAS, 2 to 6.

POSSESSION.

See RAILROAD, 9

PRACTICE.

See ABATEMENT, 1; APPEAL, 1, 2; BILL OF EXCEPTIONS; SUPREME COURT.

1. *Objection to Evidence.*—Where part of the answer of a witness is competent, though part is incompetent, it is not error to overrule a motion to strike out such answer. *Evansville, etc., R. R. Co. v. Swift, 34*
2. *Refusal to Strike Out Pleading.*—A refusal to strike out a pleading is not an available error. *Chaplin v. Sullivan, 50*
3. *Same.—Error in Assessment of Damages.—New Trial.*—Error in the amount of the assessment of damages can only be presented by a motion for a new trial. *Ib.*
4. *Venire de Novo.—Insufficient Finding.*—Error in making insufficient or indefinite findings, can only be presented by a motion for a *venire de novo*. *Ib.*
5. *Complaint.—Numbering Paragraphs.*—In a suit to foreclose a chattel mortgage securing two notes, where the cause of action is stated in one paragraph of the complaint, it is not error to overrule a motion to require the plaintiff to separately state and number his causes of action. *Mansfield v. Shipp, 55*
6. *Overruling Demurrer to Bad Answer.*—Sustaining a demurrer to a good special answer, when the facts pleaded can be shown under the general denial already in, is not available error, but it is otherwise where the court overrules a demurrer to a bad answer. Such error is fatal. *Messick v. Midland R. W. Co., 81*

7. *Venire de Novo*.—*When will be Awarded*.—A *venire de novo* will be awarded only where the special findings are defective in form.
Horton v. Hastings, 103
8. *Uncertainty in Complaint*.—*How Reached*.—*Demurrer*.—A demurrer will not lie to a complaint for uncertainty. The remedy is by motion to make the complaint more specific.
Falley v. Gribbling, 110
9. *Striking Out Pleading*.—*Bill of Exceptions*.—The ruling of the court in striking out a pleading must be saved by a bill of exceptions to present any question on appeal.
McDonald v. Geisendorff, 153
10. *Appeal*.—*Sufficiency of Complaint*.—Where some of the defendants file a cross-complaint alleging the same facts alleged in the complaint, and asking the same relief, they can not upon appealing from a judgment in favor of the other defendants question the sufficiency of the complaint.
Bingham v. Walk, 164
11. *Same*.—Where evidence is objected to on the ground of its incompetency and immateriality, an objection can not be made on appeal on account of the incompetency of the witness.
Ib.
12. *Same*.—*Objections to Evidence*.—Only such objections to the admission of evidence as are made in the court below will be considered on appeal.
Ib.
13. *Special Finding*.—*Facts Found Unsupported by Evidence*.—*Motion for New Trial*.—Where facts found are not sustained by the evidence the question is properly presented in the Supreme Court for review by a motion for a new trial, and not by a motion to strike out such parts of the finding as are supposed to be unsupported by the evidence.
Tarkington v. Purvis, 182
14. *Pleading*.—*Leave to Amend*.—*Discretion of Court as to*.—*Rule on Appeal*.—The granting of leave to amend pleadings, after the issues are closed, and especially pending the trial, is a matter resting largely in the discretion of the trial court. It is only in cases where there seems to have been an abuse of that discretion, apparently resulting in injustice, that the Supreme Court will interfere. Where the record shows that the party requesting leave to amend could not possibly have been injured by the refusal of the court to permit it, the question whether or not the court abused its discretion will not be inquired into.
Chicago, etc. R. W. Co. v. Hunter, 213
15. *Same*.—*Errors*.—*When Party can Complain*.—A party can only complain of the court's errors when he is injured by them.
Ib.
16. *Same*.—*Errors Assigned*.—*When Waived*.—A party to be entitled to have alleged errors considered must do more than merely call attention to them, and assert that they are errors. Unless there is at least an attempt at argument, or something to indicate wherein they are claimed to be erroneous, aside from the mere assertion, they will be considered as waived.
Ib.
17. *Demurrer*.—*Sustaining of*.—*When Not Available Error*.—*Complaint*.—Where a demurrer is sustained to one paragraph of a complaint, and additional paragraphs are subsequently filed, alleging substantially the same facts, and requiring no more evidence than the one held bad, the ruling on the demurrer is not available.
Summers v. Tarney, 123 Ind. 560, distinguished. *Hormann v. Hartmetz*, 353
18. *Same*.—*Bill of Exceptions*.—*What Record Must Show as to Filing*.—Unless the record affirmatively shows that a bill of exceptions has been filed, there is no bill in the record. Section 629, R. S. 1881.
Ib.
19. *Same*.—*Bill of Exceptions*.—*Date of Presentation*.—*Must Appear in Bill*.—The date of the presentation of a bill of exceptions must be stated

- in the bill itself. It is not sufficient to endorse the time upon the bill. *Ib.*
20. *Same.—Appeal.—Objections to a Judgment, or Decree.—When Must be First Made.*—Objections to a judgment, or decree, can not be successfully made, for the first time, on appeal. Specific objections must be presented to the trial court, and so presented as to direct attention to the defects, or errors, and enable the trial court to review them, and, if need be, to correct them. *Ib.*
21. *Motion to Dismiss Appeal.—Notice to Appellants.—Supreme Court Rule.*—Under Rule 14 of the Supreme Court, a motion to dismiss an appeal because of the alleged insufficiency of the notice of appeal, will be overruled if the appellants have not been given notice of the motion. *Dick v. Mullins, 365*
22. *Demurrer.—Answer.—Insufficient Paragraph.—Overruling Demurrer to.—Effect of.*—It is error to overrule a demurrer addressed to an insufficient paragraph of answer, although there are other and more comprehensive paragraphs of answer. *Scott v. Steller, 385*
23. *Instruction.—Bill of Exceptions.*—Section 533, R. S. 1881, clause 6, relating to making the instructions a part of the record by order of court without a bill of exceptions, does not take from a party the right to bring the instructions into the record by bill of exceptions. *Plank v. Jackson, 424*
24. *Objections to Evidence.—Vouchers.—Submission to Expert Witnesses.—Motion to Strike Out.*—Where the defendant submits to the plaintiff's expert witnesses checks and vouchers, not papers in the cause, which purport to be in the genuine handwriting of the defendant, but which were not, in fact, in his handwriting, and did not bear his genuine signature, and cross-examines the witnesses as to their genuineness, without objection on the part of the plaintiff, and the plaintiff re-examines the witnesses as to such checks and vouchers, no question of the competency of the evidence is presented by a motion to strike out. *Newlon v. Tyner, 466*
25. *Adjournment of Court for the Day.—Reconvening of on Same Day.—Appointment of Administrator.*—A judge during term time may adjourn court for the day and then reconvene it, and the appointment of an administrator made after the court has so reconvened will not be vitiated, on that account. *Brown v. Stewart, 507*
26. *Same.—Complaint.—When Supreme Court Need not Set Out.*—Where no question was raised either in the circuit or in the Supreme Court as to the sufficiency of a complaint it is not necessary for the latter court in rendering its opinion to set out the complaint. *Ib.*
27. *Action for Personal Injuries.—Medical Examination of Party.—Motion for.—When Properly Overruled.*—It was not error in an action for personal injuries for the court upon the second trial of the cause to refuse to require the plaintiff to submit to an examination by medical experts, the motion to that effect not having been made by the defendant until after the plaintiff had put in his evidence and rested his case, and the motion not being supported by any affidavit showing any necessity for it, or any belief as to what such examination would develop. *Terre Haute, etc., R. R. Co. v. Brunker, 542*

PREFERENCE OF CREDITORS.

See BANKS AND BANKING, 3.

PREFERRED CLAIM.

See LIEN.

PRESUMPTION.

See BANKS AND BANKING, 2; COUNTY COMMISSIONERS.

PRINCIPAL AND SURETY.

See MARRIED WOMAN.

1. *Waste of Collateral Securities.—Release of Surety.*—If the payee of a debt hold any securities or collaterals to secure the payment of the debt, the surety has the right to insist upon their application to the payment of the debt; and if he waste them, the surety, to the extent of their value, is released. *Nichols, Shepard & Co. v. Burch, 324*
2. *Rights of Surety.—Suit by Owner of Promissory Note.—Surety can not Compel by Proceedings in Equity.*—The surety on a promissory note can not maintain a suit in equity to compel the owner to bring suit upon the note and proceed to collect it, as an adequate remedy at law is afforded by sections 1210 and 1211, R. S. 1881, which provide that the surety, by service of notice on the creditor, can compel him to sue upon the note, and that the creditor's failure to do so will release the surety. *Barnes v. Sammons, 596*
3. *Same.—Fraudulent Conveyance by Principal Debtor.—Action to Set Aside.*—When Surety can not Maintain.—A surety upon a note, who has not paid the debt, can not bring a suit to have a fraudulent conveyance of real estate made by the principal debtor set aside, and have the land declared subject to the payment of the debt. *Ib.*

PRIORITY OF LIENS.

See DRAINAGE, 8; MORTGAGE, 1; SUBROGATION.

PRIVILEGED COMMUNICATIONS.

See ATTORNEY AND CLIENT, 1; WITNESS, 1.

PROMISSORY NOTE.

See GIFT, 1.

- Consideration.—Special Verdict.*—The defendant executed his promissory note as a part of a private subscription of \$30,000 to secure the extension of a line of railroad. It was found impossible to raise said \$30,000. The special verdict showed that the defendant agreed that the note should be used to make up a subscription of \$7,500; that afterwards it was delivered to a bank under said agreement, and that the defendant acquiesced in such delivery and agreed to pay it, upon the faith of which the other subscribers to the fund acted. The consideration for which the note was executed, namely, the extension of the line of railway, appeared on its face. The extension was made. *Held*, that the note was shown by the special verdict to have been executed for a valid consideration. *Cook v. McNaughton, 410*

PUBLIC BUILDINGS.

See COUNTY COMMISSIONERS.

QUIETING TITLE.

See COSTS, 3; FORMER ADJUDICATION; TAXES, 1, 2; TRUST AND TRUSTEE, 3.

1. *Innufficiency of Answer Setting up an Easement.*—In an action to quiet title, an answer which, without denying plaintiff's title, sets up an easement in the land as a full defence to the action, is demurrable. *Messick v. Midland R. W. Co., 81*
2. *Same.—Railroad.—Easement.—Directing Verdict.*—In a suit against a railroad company to quiet title, where it was a material question whether the company had a valid easement in the land, depending upon whether the entry upon said land by the company and the con-

struction of the roadway were with the knowledge and consent of the owner, and the owner testified that he objected to and protested against the entry, which statement was not denied by the defendant, it was error in the court to take the case from the jury and direct a verdict for the company. *Ib.*

RAILROAD.

See EMINENT DOMAIN, 2; QUIETING TITLE, 2.

1. *Appropriation of Land for Right of Way.—Measure of Damages.—Evidence.*—In a proceeding by a railroad company to appropriate land for its right of way, it is proper to prove the value of the land without the road across it, and its value when divided by the road into parcels, and it is proper for the jury to consider such evidence in assessing the damages. *Evansville, etc., R. R. Co. v. Swift, 34*
2. *Same.—Appropriation Proceedings.—Jurisdiction.*—The principal object of proceedings to appropriate land for the right of way of a railroad is to appropriate and acquire a title to the land, and the assessment of damages is a mere incident to and arises out of the act of appropriation; and the Supreme Court has jurisdiction on appeal. *Ib.*
3. *Accident at Crossing.—Contributory Negligence.*—Where a wife was riding in a wagon with her husband who was driving, and they approached a railroad crossing, known by the wife to be dangerous, when a train was coming up in full view, and the husband stopped the team, but immediately afterwards attempted to cross in front of the train and both were killed, the wife in failing to warn the husband or to look or listen for approaching trains was guilty of contributory negligence, and there can be no recovery for her death. *Miller v. Louisville, etc., R. W. Co., 97*
4. *Same.—Photograph as Evidence.*—It was not error to permit a witness to testify that a photograph introduced in evidence was a correct representation of the crossing and surroundings where the accident occurred. *Ib.*
5. *Crossing.—Duty of Person Approaching.*—The presence of a railroad track upon which a train may at any time pass is notice of danger, and it is the duty of a person about to cross such road on a public highway, to exercise caution in so doing, and to look both ways for approaching trains, if the surroundings are such as to admit of such a precaution. *Mann v. Belt R. R., etc., Co., 138*
6. *Same.—Mental absorption, or reverie, induced by grief or business.* will not excuse the omission of the duty to look and listen. *Ib.*
7. *Same.—Accident at Crossing.—Contributory Negligence Declared as Matter of Law.*—In an action against a railroad company for an injury at a railroad crossing, it appeared that the plaintiff, who was approaching in a vehicle, and was familiar with the crossing, when about two hundred and fifty feet from the crossing looked to the east, where he could see about one-fourth of a mile, and saw no approaching train. He did not look to the east again, but looked to the west, where the view of the track was somewhat obstructed. If he had looked to the east, when within one hundred feet of the railroad, he would have had an unobstructed view of nearly one-half mile. He drove to the crossing in a slow trot, and was struck by a train from the east and seriously injured. No signals were given by the approaching train. *Held*, that the court might adjudge, as matter of law, that the plaintiff was guilty of contributory negligence. *Ib.*
8. *Consolidation of Companies.—Title to Real Estate.*—Where land is conveyed in fee simple to a railroad company, and afterwards the company is consolidated with another, and further consolidations take

place from time to time, the new companies formed by the successive consolidations succeed to said real estate. *Cashman v. Brownlee*, 266

9. *Estoppel.—Adverse Possession.*—The heirs of the grantor to the railroad company, and their grantees, are estopped by his deed from setting up an adverse title derived from possession alone, as against his grantee and those claiming under it. *Cashman v. Brownlee*, 266
10. *Fencing Track.—Duty as to.—Violation of Duty.—Injury to Passenger.*—A railroad company must take measures to so fence its track as to prevent animals from running upon it. If the duty to fence is negligently violated, and the violation of duty is the proximate cause of injury to a passenger, his right of action is clear and complete. *Louisville, etc., R. W. Co. v. Hendricks*, 462
11. *Same.—Accident to Passenger.—Presumption of Negligence.—Burden of Removing.*—The burden of proof is upon a railroad company to remove the presumption of negligence which arises from the happening of an accident which causes injury to a passenger. *Ib.*
12. *Accident at Crossing.—Contributory Negligence of Injured Party.—What Constitutes.—When Question of Fact for Jury.*—One who approaches a railroad crossing with which he is familiar, and attempts to cross without looking and listening for approaching trains, where it is possible to do so, is guilty of such contributory negligence as precludes him from a recovery if he is injured, although the crossing was supplied with a flagman, and the flagman did not give notice of the approach of danger. A person attempting to cross should not have the right to assume, from that circumstance, that no danger existed, and enter upon the railroad track without looking. Had the flagman done anything to induce the appellant to attempt the crossing at the time she was hurt, or anything to throw her off her guard, then the question of her negligence would have been a question for the jury. *Cadwalader v. Louisville, etc., R. W. Co.*, 518
13. *Personal Injuries.—Negligence.—Crossing.—Failure to Give Signal.*—A railroad company will not be exonerated from liability in an action for personal injuries alleged to have been sustained by a traveller on the highway when its servants in charge of a train failed to give the proper signals for a crossing which the train was approaching, but did give a signal for a second crossing before reaching the first crossing, which signal was given at a point much nearer to the latter crossing than the signal required for that crossing, and the traveller who was upon the highway stopped and looked and listened and approached slowly, and continued to look and listen, seeing or hearing nothing, until his horses were in such close proximity to the train that they became frightened at the train, or at the sounding of the whistle for the second crossing, and he was injured in consequence thereof. As between the railroad company and the approaching traveller it induced him to approach to within an unsafe proximity to the crossing by the failure to give the lawful signals, and the train was not lawfully there as against the traveller without having first given the signal required by law before coming upon the crossing. *Terre Haute, etc., R. R. Co. v. Brunner*, 542
14. *Same.—Special Verdict.—When not Defective.*—A special verdict in such a case is not defective which fails to find that the horses were docile, and that the traveller could have heard the signals if sounded, and would have stopped and could have controlled his horses at that distance. *Ib.*

RATIFICATION.

See CONTRACT, 6.

REAL ESTATE.

1. *Partnership.—Treated as Personalty.*—Real estate owned by a partnership is treated as personal property, although the title is taken in the name of one of the partners. *Dickey v. Shirk, 278*
2. *Same.—Wife's Interest in Partnership Realty.*—The wife of one of the partners of a partnership has no interest in the real estate owned by the partnership which is sold and conveyed, even without her joining in the deed of conveyance, during the partnership. *Ib.*

REAL ESTATE, ACTION TO RECOVER.

1. *Within what Time Must be Brought.—Foreclosure Sale.—Statute of Limitations.—Legal Disabilities.—Married Woman.—Execution Debtor.—Who is Under Section 293, R. S. 1881.*—A mortgage was executed by a husband and wife on the lands of the husband to secure his debt. After the execution of the mortgage the land was conveyed to the wife. The mortgage was thereafter foreclosed, the husband and wife being made parties to the foreclosure proceedings. The land was sold at sheriff's sale, the mortgagor being the purchaser, and in due time he received a sheriff's deed therefor. After the death of the wife, and more than ten years from the date of the foreclosure sale, an action was instituted by the husband and children to recover said real estate, on the ground that the decree for the sale of the land was void for certain reasons set forth in the complaint.
Held, that the husband was an execution debtor within the contemplation of section 293, R. S. 1881, and that any action for the recovery of the real estate in which he joined must be brought within ten years after the foreclosure sale.
Held, also, that the wife was an execution debtor under the provisions of the statute, and that all persons claiming title under her, acquired since the rendition of the judgment, must bring suit within ten years after the foreclosure sale.
Held, also, that the sale of the land under the decree was sufficient to give color of title and bring the case within the operation of the statute of limitations.
Held, also, that the wife was not within the exception in favor of persons under legal disabilities, contained in the present statute. *Sedwick v. Ritter, 209*
2. *Sale on Execution.—Action to Recover.—Within what Time Must be Brought.—Section 293, R. S. 1881, Applies to Void Sales.*—Where land was sold under a decree of foreclosure by a sheriff without the county in which he holds office, and in due time a sheriff's deed was executed to the purchaser, and under that purchase he entered into possession of the land, and held it for more than ten years under his sheriff's deed, before a suit was instituted to recover the land, the action for recovery is barred by the statute of limitations. Section 293, clause 3, R. S. 1881, providing that an action can only be brought by the execution debtor to recover real property sold on execution within ten years from the day of sale, applies to sales where there was an entire want of jurisdiction in the court to order the sale of the property. *Orr v. Owens, 229*

REASONABLE DOUBT.

See CRIMINAL LAW, 9.

RECEIVER.

See CHATTEL MORTGAGE, 3.

1. *Action by.—Leave of Court to Sue.—Complaint Must Show.*—A complaint filed by a receiver which fails to allege that leave of the court to institute and prosecute the action has been obtained is fatally defective. *Davis v. Ladoga Creamery Co., 222*

2. *Same.—Alone has the Right to Sue.*—Where a receiver is appointed for a company he succeeds to all the rights of the company, and he alone, under the orders of the court, can maintain an action for the enforcement of such rights. The right of the company to sue is suspended as long as there is an acting receiver. *Id.*
3. *Application for Appointment of.—Application, how Considered.—Applicant's Interest in Property.—Conditional Sale.*—In an agreement for the sale or trade of a stock of goods, it was stipulated that the purchaser should not move the goods from the town in which they then were, but that he should be allowed to sell the same, and that he should turn over to the vendor all moneys arising from the sale of the goods until the difference between them was settled.
- Held*, that in order that the title may not pass, in the transfer of personal property, there must be a plain and express stipulation to that effect, and that under the foregoing facts the title had passed, and that the seller had no such right or interest in the property as entitled him to the appointment of a receiver, even if the purchaser was insolvent and was disposing of the goods and applying the proceeds to his own use, in violation of the terms of his contract.
- Held*, also, that in an application for a receiver the court must look to and consider the facts stated in the application, and unless they are sufficient to justify the appointment it must be denied. *Steele v. Aspy*, 367

RECORDING.

See CHATTEL MORTGAGE, 2.

REDEMPTION FROM TAX SALE.

See DRAINAGE, 9.

RELATIONSHIP.

See JUROR, 1.

RELEASE OF SURETY.

See CHATTEL MORTGAGE, 4; PRINCIPAL AND SURETY, 1, 2.

RESCISSION.

See CONTRACT, 1 to 4.

RES GESTÆ.

See EVIDENCE, 1.

REVERSION.

See DEED, 4.

SALE.

See ESTOPPEL.

SALOON.

See MUNICIPAL CORPORATION, 3.

SET-OFF.

A Set-off to a Set-off.—A set-off can be pleaded to a set-off.

Chaplin v. Sullivan, 50

SHERIFF'S SALE.

See REAL ESTATE, ACTION TO RECOVER, 1.

SPECIAL FINDING.

See PRACTICE, 13.

Judgment.—Intendment.—To warrant a judgment in favor of a party, on a special finding, the finding must contain all the facts necessary to the judgment, and nothing is to be taken by intendment.

Town of Freedom v. Norris, 377

SPECIAL VERDICT.

See PROMISSORY NOTE; RAILROAD, 14; VERDICT, 2, 3.

SPECIFIC PERFORMANCE.

1. *Statute of Frauds.—Burden to Show Contract Taken Out of the Statute.*—The party who seeks to enforce a specific performance of a contract to convey real estate has the burden to show that such things had been done as took the contract out of the statute of frauds.
Luzader v. Richmond, 344
2. *Same.—Complaint.—Delivery of Deed to Third Person.—Conditions.*—In a complaint for specific performance of a contract to convey land, where the plaintiff alleges a full compliance with its terms on his part, and shows that the vendor delivered the deed to a third person to be delivered to the plaintiff pursuant to the contract, but fails to allege whether or not the delivery was conditional, it is insufficient on demurrer.
Ib.

STATUTE.

See BANKS AND BANKING, 3; BASTARDY, 3; CONSTITUTIONAL LAW, 1, 4; COSTS, 3; COUNTY COMMISSIONERS; DECEDENTS' ESTATES, 7; DRAINAGE, 1, 3, 11, 12; ELECTIONS; FORMER ADJUDICATION; GRAVEL ROAD, 1; INTERPLEADER; LIEN, 1; LIS PENDENS; NATURAL GAS, 3, 6; OFFICE AND OFFICER, 6; PARTITION, 3; PARTNERSHIP, 2; PRINCIPAL AND SURETY, 2; REAL ESTATE, ACTION TO RECOVER; TAXES, 1; TOWNSHIP TRUSTEE.

1. *Object in Construing.—Isolated Words or Sentences.*—The object to be attained in construing a statute is to ascertain the intention of the Legislature which passed it, which intention is to be ascertained by looking to the whole statute, and not in the consideration of isolated words, or sentences.
Gilson v. Board, etc., 65
2. *Rules for Construing.*—In the construction of a statute the court, in order to ascertain the intention of the Legislature, will look to the letter of such statute, to it as a whole, to the circumstances under which it was enacted, to the old law, if any, to the mischief to be remedied, to other statutes, to the rules of the common law, to the sources from which it was derived, to the general principles of equity, to its effect, and to the condition of affairs when it was enacted.
Board, etc., v. Board, etc., 295
3. *Re-Enactment.—Effect.*—The re-enactment of a statute makes the statute as re enacted the law of the State.
Hyland v. Brazil, etc. Co., 335

STATUTE CONSTRUED.

See DRAINAGE, 13; GAMING, 3; NEW TRIAL, 4; STREET IMPROVEMENT.

STATUTE OF FRAUDS.

See CONTRACT, 5, 6; SPECIFIC PERFORMANCE, 1.

Building Contract.—Agreement Between Owner and Sub-Contractor.—Collateral Contract.—Where the owner of property undertakes to pay for work and materials to be subsequently done and furnished by a sub-contractor in order to secure the completion of a building where the principal contractor has failed to carry on the work, the promise is an original one, and not within the statute of frauds, and is enforceable.
Board, etc., v. Cincinnati, etc., Co., 240

STATUTE OF LIMITATIONS.

See DECEDENTS' ESTATES, 4, 5; REAL ESTATE, ACTION TO RECOVER.

STENOGRAPHER'S REPORT.

See BILL OF EXCEPTIONS.

STREET IMPROVEMENT.

See STREET RAILWAY, 3 to 6.

Unplatted Lands.—Assessment for Improvement.—Public Highway.—Under the act of April 13th, 1885 (Acts 1885, p. 207), relating to the improvement of streets and alleys, the power to assess to a distance of one hundred and fifty feet back from the line of the improvement can only be exercised where there is a tract of unplatted land extending back that distance. The lands included in a public highway, on which the unplatted tract abuts, can not be assessed for the improvement, neither can the highway be crossed, and tracts of land lying beyond it be assessed for such improvement. *City of Frankfort v. State, ex rel., 438*

STREET RAILWAY.

1. *Charter.—Contract.*—A charter granted by the common council to a street railway company to construct and operate a street railway within the corporate limits of a city, constitutes a contract between such railway company and the city.

Western Paving, etc., Co. v. Citizens', etc., R. R. Co., 525

2. *Same.—Charter, How Construed.*—Such charter is to be strictly construed against the railway company, and it has no doubtful rights under such charter, for where there are doubts they are construed against the grantee and in favor of the city. *Ib.*

3. *Same.—Amendatory Ordinance.—Consideration.*—An ordinance of the city of Indianapolis, passed in 1864, authorizing the Citizens' Street Railway Company to use the streets of the city for the purpose of constructing and operating a street railway, provided that the company should boulder the space between rails, and pave, boulder or otherwise improve and keep in repair two feet on the outside of each rail. An amendatory ordinance, passed in 1878, provided, instead, that the company should keep the space between the rails, together with all bridges and crossings of gutters, and two feet on the outside of each rail in good repair. Both of these ordinances were accepted by the company. The amendatory ordinance was passed in consideration that the company should unite its two disconnected systems of railway, charge a fare of five cents for transportation to any part of the city, and construct within a given time certain additional lines of railway.

Held, that a compliance by the company with the conditions of the ordinance was a sufficient consideration for the amended ordinance, and that when it was accepted by the company and its conditions complied with it became a binding contract. *Ib.*

4. *Same.—Repairs.—Improvements.*—Where an ordinance provides that a street railway company shall keep the space between the rails and a certain space outside each rail in repair, the city can not, by a subsequent ordinance, impose on such company, without its consent, the obligation of paying a proportionate share of the cost where a street occupied by its railway is improved. *Ib.*

5. *Same.—Consideration.—Parol Evidence.*—An ordinance amending a section of an ordinance which required the Citizens' Street Railway Company to pave between its tracks provided that such company should only be required to keep the space between the rails in good repair. The city by a subsequent ordinance sought to compel the company to pay a part of the cost of street improvements. This ordinance was not accepted by the company. Afterwards the city granted to the Citizens' Street Railroad Company, the purchaser of the street railway, all the rights, privileges and franchises of the

'Citizens' Street Railway Company in consideration that the former company should assume all the obligations and duties of the latter.

Held, that it was not competent to prove by parol that the new company, in consideration of the passage of the ordinance ratifying and approving the sale, accepted the ordinance which sought to make the old company liable for street improvements. *Id.*

6. *Same.—Liability for Assessment.—When Property-Owner not Estopped to Deny.*—A street railway company, whose property is not subject to assessment for street improvements, is not estopped to deny its liability for an assessment, because it stands by without objection until the improvement is completed, if it is one which the city has authority to make. *Id.*

SUBROGATION.

1. *Purchaser of Decedent's Realty Paying Debt of the Estate.—Priority of Mortgage Executed by Heir.*—A purchaser of real estate of a decedent's estate, who pays off a general debt of such decedent at the request of an heir in order to prevent the real estate being sold to pay such debt, is entitled to be subrogated to the lien the creditor had on such realty by virtue of his claim as against such heir; and such lien is prior to a mortgage executed by an heir of such decedent prior to such payment. *Chaplin v. Sullivan, 50*
2. *To Rights of Grantor.—Conditional Conveyance.*—Where the owner of real estate conveys it in consideration that the grantee shall board, nurse and care for him during his lifetime, and by reason of the failure of such grantee to provide necessary medical aid he is compelled himself to call a physician, such physician will be subrogated to the rights of the owner, and may enforce a lien for the value of his services upon the real estate conveyed. *Huffmond v. Bence, 131*
3. *Volunteer.—Note Given by Third Person in Payment of Judgment.—Subrogated to Lien of Judgment.—Judgment Over.*—The owner of land gave a mortgage upon it, which was foreclosed, and the land bought in at sheriff's sale by the mortgagee for one-half the amount of the debt. The plaintiff, after the sale, filed a transcript of the judgment in an adjoining county. One C., by agreement all around, then executed his note, for four-fifths of the debt to the mortgagee, and the mortgagor agreed with C. to pay the remainder due on the foreclosure, and he had so paid him. By agreement C. took an assignment of the sheriff's certificate as a security for the liability he incurred in giving the note to the mortgagee. C. was compelled to pay the note he had given.

Held, that C. was entitled to be subrogated to the lien of the judgment upon the land in the county where it was rendered, and was also entitled to a judgment for the sum in excess of the value of the land.

Shattuck v. Cox, 293

SUMMONS.

See DECEDENTS' ESTATES, 7.

Omission of Full Names of Plaintiffs.—Motion to Quash.—Where the Christian names of the plaintiffs are not given in full in the summons, but are set out in the complaint, it is not reversible error to overrule a motion to quash the summons. *Mansfield v. Shipp, 55*

SUPERINTENDENT OF HOSPITAL FOR INSANE.

See OFFICE AND OFFICER, 6.

SUPREME COURT.

See PRACTICE, 21, 26.

1. *Absence of Objection Below.—Effect of on Appeal.*—The Supreme Court

will not reverse rulings of the circuit court to which no objection was made and no exception reserved, and rulings which the court below had no opportunity to correct. *Falley v. Gribbling*, 110

2. *Practice.—Overruling Request for Jury.*—Error in overruling a motion to try the issues in the case by a jury can be presented on appeal only by a motion for a new trial. *Huffmond v. Bence*, 131
3. *Conflicting Evidence.*—Where the evidence is conflicting the Supreme Court will not pass upon its sufficiency. *Bingham v. Walk*, 164

SURPRISE.

See NEW TRIAL, 1, 6.

SURVIVING PARTNER.

See PARTNERSHIP.

TAXES.

See BANKS AND BANKING, 1; CONSTITUTIONAL LAW, 5.

1. *Tax Title.—Actions to Quiet Title.*—The remedy afforded by section 6496, R. S. 1881, which provides for actions to quiet title in persons holding tax deeds, belongs to those only who hold such deeds. *McDonald v. Geisendorff*, 153
2. *Same.—Tax Certificate.—Lien.*—A pleading by one holding only a tax certificate, which proceeds on the theory that the pleader is entitled to such remedy, is bad, as he is entitled to nothing more than to be protected in the lien transferred to him by the State at the time of his purchase at tax-sale. *Ib.*
3. *Injunction.—Payment of Part Due.—Tender.—Pleading.*—An injunction will not lie to prevent the collection of taxes, a portion of which are legally assessed, without an allegation in the complaint that the plaintiff has paid so much of the assessment as is lawfully due; or that he has tendered the same to the tax collector, and that he keeps the tender good by bringing the money into court for his benefit. *Hewett v. Fenstemaker*, 315
4. *Board of Equalization.—Organization.—Time of Meeting.*—A board of equalization must meet and organize as the law requires or its acts will be void. In 1889 the time for the meeting was the third Monday in June. *Hyland v. Brazil, etc., Co.*, 335
5. *Same.—Assessment of Mining Corporations by Board of Equalization.—Notice of Meeting.*—Under the tax law of 1881, no special notice of the time of the meeting of the board of equalization is required to be given to a mining corporation, for the purpose of assessing its property rights, where such corporation has made and delivered to the proper officer a schedule of its property for appraisal and taxation. Such a corporation is bound to take notice of the time and place of the meeting of such board. *Ib.*
6. *Same.—Assessing Capital Stock of Mining Corporation.*—Where all the tangible property of a mining corporation is duly returned for taxation, and it represents the entire capital of the corporation, the capital stock could not be assessed for taxation under the tax law of 1881 and its amendments. *Ib.*
7. *Same.—Tender of Amount Due.—Injunction.—Assessment of Capital Stock.*—In a proceeding to enjoin the collection of a tax assessed upon the capital stock of a mining corporation, it is not necessary to first make a tender of the amount of tax due upon its tangible property, where such property is fully returned and fairly valued. *Ib.*
8. *Same.—Power of Board of Equalization.*—The board of equalization can not make property of any kind subject to assessment for taxation if there is no statute conferring that authority upon it. *Ib.*

9. *County Auditor.—Assessment of Omitted Property.*—The auditor has no power to increase the valuation of property properly listed for taxation, over the valuation placed on it by the township assessor or by the board of equalization; he can only assess property which has been omitted from the assessment lists and has not been assessed.
Florer v. Sherwood, 495
10. *Same.—Omitted Property.—Identification.*—To justify such assessment by the auditor there must be specific omitted property which is susceptible of identification. *Ib.*
11. *Same.—Insufficient Description.*—A description of the property omitted as consisting of "money on hand or on deposit, money loaned, and credits due the estate," is an insufficient identification and description upon which to base an assessment of omitted property, especially where it is admitted that the part of the property listed and assessed, and that not listed and assessed, all belonged to the same classes. *Ib.*
12. *Same.—Valuation of Listed Property.—Fraud.*—While the person listing property is required to place a valuation upon it, such valuation will be regarded only as a mere statement of opinion, and fraud can not be predicated on such statement. *Ib.*
13. *Same.—Void Assessment.—Decree.*—Construction of.—Where an assessment made by the county auditor is adjudged void, and a decree is rendered cancelling the tax and enjoining its collection, and directing the auditor to strike out and obliterate from the tax duplicate the tax assessed, the words "strike out" and "obliterate," will be construed as requiring the auditor to make such a memorandum on the tax duplicate as will show a cancellation. *Ib.*
14. *Invalid Sale of Land to Pay.—What Constitutes.—Title of Purchaser.—Liability for Waste.—Void Deed of Remote Grantor.—Burden of Proof.—Lien for Taxes.—How Asserted.—Incorrect Description of Land on Tax Duplicate.—When Immaterial.*—A. was the owner of the land in controversy, which was part of a larger tract belonging to T. She was taxed with land which she did not own, and paid the taxes, supposing that she was paying the same on the land which, in fact, belonged to her. The land belonging to A. was taxed with the other land to T., and sold in a suit to foreclose a tax lien, the appellant becoming the purchaser thereof. A. was not a party to the suit. After the date for redemption the appellant took a deed, and entered into the possession of the land and cut some timber.
Held, that the decree of foreclosure was, as to A., an absolute nullity, and the sale thereunder did not affect her title to the land in dispute.
Held, also, that the deed executed by the sheriff to the appellant, pursuant to the sale on the decree against T., was no defence to an action by A. for the possession of the land in controversy, nor was it any defence to her action for waste.
Held, also, that the claim of the appellant that one of A.'s grantors, who inherited the land in dispute from her first husband, and conveyed it during her second marriage, had children alive by her first husband at the date of the execution of said deed, thereby vitiating it, must be established by a preponderance of the testimony.
Held, also, that if the appellant desired a lien for taxes on the land in dispute, the burden was upon him to prove that there were taxes due upon that particular piece of said land, and the amount of such taxes.
Held, also, that if A. paid the taxes due from her, it was immaterial whether her land was correctly or incorrectly described on the tax duplicate.
Grigsby v. Akin, 591

TAX SALE.

See TAXES, 14.

TAX TITLE.

See TAXES, 1, 14.

TENDER.

See MORTGAGE, 2; TAXES, 3, 7.

Fraud.—Rescission of Contract.—In a suit for rescission on the ground of fraud, no tender of the property received is necessary; it is sufficient for the plaintiff to show that he has preserved the property substantially in the condition in which he received it without intentional or unnecessary change. *Tarkington v. Purvis, 182*

TIME.

See ELECTIONS, 1, 2.

TORT.

See EXEMPTION FROM EXECUTION.

TOWNSHIP TRUSTEE.

Right to Hold Over.—Under the provisions of the act of March 11th, 1889 (Acts 1889, p. 425), a person who had held the office of township trustee for two terms consecutively, at the date of the township election, in April, 1890, was entitled to hold over until his successor was duly elected and had qualified. He would have been ineligible to hold the office by virtue of a new election, as the above act provides that no person shall be eligible to the office of township trustee more than four years in any period of eight years, but this would not prevent his holding over after the close of his second term, until his successor was elected and qualified. Const., art. 15, section 3. *State, ex rel., v. Bogard, 480*

TRANSFER OF STOCK.

See DECEDENTS' ESTATES, 15, 16.

TRUST AND TRUSTEE.

See CONTRACT, 6.

1. *Husband and Wife. — Conveyance Taken in Wife's Name. — No Implied Trust Resulting From Payment of Purchase-Money.*—Where a conveyance of real estate is taken in the name of the wife, and the purchase-money is paid by the husband, no resulting or implied trust arises in favor of the latter. *Montgomery v. Craig, 48*
 2. *Same. — Parol Agreement Ineffectual to Create Express Trust.*—A parol agreement between the husband and the wife in such a case that the wife shall hold the land as his trustee, is ineffectual to create an express trust. *Id.*
 3. *Conveyance of Land in Violation of. — Purchaser's Knowledge. — Action to Quiet Title. — Evidence.*—B, who was insane, conveyed a piece of land, which was encumbered, to his son for the purpose of borrowing money to pay off the mortgage. The son was to hold the title in the land as trustee for B. and wife. The son permitted the mortgage to be foreclosed, and had a firm of real estate agents buy the sheriff's deed, and execute a quitclaim deed to him, he giving them a mortgage on the land to secure their indebtedness. The son thereafter conveyed the land to S. who was informed and knew before he purchased or took the conveyance of the land, that his grantor only held the land as trustee for B. and wife, and that he had paid no consideration therefor.
- Held*, that in an action by S. against B. and wife to quiet his title to said real estate, it was competent for B. to show that he was insane at the time he executed a deed for the land to his son, that the son paid no

consideration therefor, and that S. purchased the land with full knowledge of all the facts.

Held, also, that S. acquired no better title to the land than his grantor possessed. *Barrett v. Sear*, 261

USER.

See EASEMENT, 8.

VACATION OF OFFICE.

See OFFICE AND OFFICER, 1.

VENDOR AND PURCHASER.

Bona Fide Purchaser.—Who is not.—The plaintiff, who had exchanged certain real estate for an interest in a partnership, offered to rescind, and perfected his right to do so by giving notice and taking all the necessary steps, because of the misrepresentations of the partner as to the firm assets. Afterwards a conveyance of the real estate was taken from the fraudulent partner by such partner's father in consideration of an antecedent debt.

Held, that such grantee was not an innocent purchaser as against the plaintiff. *Tarkington v. Purvis*, 182

VENIRE DE NOVO.

See PRACTICE, 4, 7.

VERDICT.

See DRAINAGE, 3; QUIETING TITLE, 2.

1. *Weight of Evidence.*—A verdict will not be disturbed for the reason that it is not supported by the evidence, if there is any evidence in the record supporting the verdict. *Ohio, etc., R. W. Co. v. Percy*, 197
2. *Special.—Defects in.—Waiver.*—Where a special verdict finds all the facts necessary to support a judgment, but is defective in finding generally as to one issue instead of specially, if the verdict is received without objection, and no motion for a *venire de novo* or a new trial is made, the defect is waived. *Cook v. McNaughton*, 410
3. *Special.—Conclusions of Law.—When Verdict not Vitiating.*—A special verdict is not vitiated by reason of stating conclusions of law, if, after eliminating all such conclusions, the necessary facts are fully set forth. *Terre Haute, etc., R. R. Co. v. Brunker*, 542

VOLUNTARY ASSIGNMENT.

See BANKS AND BANKING, 3.

WAIVER.

See CONTRACT, 1, 2; VERDICT, 2.

WARRANTY.

See DEED, 1; INSURANCE, 2, 3.

WATERCOURSE.

See DRAINAGE, 13.

WAY OF NECESSITY.

See EASEMENT, 2 to 5.

WILL.

1. *Life-Estate.—Power of Sale.*—A testator devised all his real estate to his wife "for and during the time of her natural life," with directions to her to conduct the farming operations thereon in the same

manner as the testator would do if he were still living, with a view of keeping their children "together at home so long as they may be under the age of twenty-one years, and may desire to remain," with a gift to her of all the interest on her money, and other annual profits of his "estate for her maintenance and the support" of their family "so long as she shall live;" and provided that at her death all his realty and personalty remaining should be divided among their children, share and share alike; and also provided that, in order to pay debts, costs of administration, or for the payment of any sum given by the will, the executors could sell and convey at any time, without an order of court, on such terms as they saw fit, any of the real or personal property of the testator, except the home farm, unless in case of the most absolute necessity.

Held, that the will vested in the wife a life-estate in the land and the fee in the children, subject to be divested only in case a sale became necessary to pay debts, costs of administration, or any sum provided by the will to be paid. *Neely v. Boyce, 1*

2. *Construction of.—Joint-Tenancy.*—Where it was provided in a will bequeathing all of the testator's personal property to two of his granddaughters, that the property should be held in trust for said children until they became of lawful age, and that if they should die without any children of their own, the property should go to his three sons, naming them, the share of one of the devisees, who died intestate under the age of twenty-one years, unmarried and without a child or children of her own, passed to the three sons of the testator. There is nothing in the will to indicate that it was the intention of the testator that the survivor should take the whole estate on the death of one of the granddaughters, or that the interest of the deceased granddaughter should descend to her heirs. Under the statutes of Indiana, property held by two or more persons as joint tenants does not go to the survivor, unless it is so expressly stipulated in the instrument creating the estate. *Johnson v. Johnson, 93*

3. *Construction of.—Fee Simple Title.—What Language Passes.*—Under a will which provided as follows: "I give and bequeath to my beloved wife, Margaret Wyatt, during her lifetime, 99 acres of land (describing it), together with all my personal estate, and at her death I will and bequeath the said 99 acres of land, together with the said personal estate, to my brother-in-law, Henry Ritter," the latter took a fee simple title to the real estate, subject only to the life-estate of the widow. He also took a fee simple title in certain other real estate, the will providing as to said real estate that the testator gave and bequeathed it to said Ritter. *Mills v. Franklin, 444*

4. *Same.—Intention of Testator.—Effect to be Given to.—Partial Intestacy.—Not Favored.—Disposition of Entire Estate.—Presumption as to.*—Where a testator says in express terms that he gives, bequeaths or devises property, real or personal, without limiting the interest or title, or making any other disposition of, or reference to it, his intention evidently was to give the person named as donee or devisee the same right and title to the property as he himself held, and that intention must be respected and upheld. A will will not be so construed as to create a partial intestacy unless the language used compels such a construction. The presumption is that when one forms an intention to make a will he intends to dispose of all his estate. *Ib.*

WITNESS.

1. *Privileged Communication.*—Where a plaintiff, in an action for malpractice, testifies to an occurrence of the sick room, the physician, or one in attendance as a consulting physician, may testify as to

what occurred, as the plaintiff by testifying removes the obligation of secrecy on the physician's part. *Lane v. Boicourt, 420*

2. *Non-Expert.—Speed of Train.*—A non-expert witness may give an opinion as to the speed at which a train was moving.

Louisville, etc., R. W. Co. v. Hendricks, 462

WRITTEN INSTRUMENT.

See GIFT, 1.

END OF VOLUME 128.

E. J. A. A.

